No. 89-7662-CFH
Status: GRANTED
CAPITAL CASE

Title: Roger Keith Coleman, Petitioner
v.
Charles E. Thompson, Warden

Docketed:
May 29, 1990

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Hall,John W.

Counsel for respondent: Curry,Donald R.

| Entry | Date | Note | Proceedings and Orders |
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| 1 | May 29 1990 | G | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 3 | Jun 20 1990 | | Brief of respondent Charles E. Thompson, Warden in opposition filed. |
| 4 | Jun 27 1990 | | DISTRIBUTED. September 24, 1990 |
| 5 | Sep 18 1990 | X | Reply brief of petitioner Roger Keith Coleman filed. |
| 7 | Sep 28 1990 | | REDISTRIBUTED. October 5, 1990 |
| 9 | Oct 15 1990 | | REDISTRIBUTED. October 26, 1990 |
| 11 | Oct 29 1990 | | Petition GRANTED. limited to Questions 2, 3 and 4 presented by the petition. |
| | | | ********** |
| 12 | Nov 21 1990 | | Record filed. |
| | | * | 12 vol., USCA 4. |
| 13 | Dec 12 1990 | | Joint appendix filed. |
| 14 | Dec 13 1990 | | Brief of petitioner Roger Keith Coleman filed. |
| 15 | Dec 17 1990 | | SET FOR ARGUMENT MONDAY, FEBRUARY 25, 1991. (3RD CASE) |
| 16 | Jan 11 1991 | | Brief amicus curiae of Criminal Justice Legal Foundation filed. |
| 17 | Jan 14 1991 | | Brief of respondent Charles E. Th mpson, Warden (Recv'd 18 copies) filed. |
| 19 | Jan 14 1991 | X | Brief amici curiae of Kentucky, et al. filed. |
| 20 | Jan 14 1991 | X | Brief amici curiae of Texas, et al. filed. |
| 18 | Jan 17 1991 | | CIRCULATED. |
| 21 | Feb 11 1991 | D | Motion of petitioner to strike non-record material filed. |
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| 24 | Feb 12 1991 | | Opposition of respondent to motion of petitioner to strike non-record filed. |
| 23 | Feb 13 1991 | X | Reply brief of petitioner in support of motion to strike non-record material filed. |
| 25 | Feb 13 1991 | | Petitioner's reply in support of motion to strike non-record material filed. |
| 27 | Feb 15 1991 | X | Reply brief of petitioner Roger Keith Coleman filed. |
| 28 | Feb 25 1991 | | ARGUED. |

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-7662

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT



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May 29, 1990

## QUESTIONS PRESENTED

1. Does Hicks v. Oklahoma prohibit a state from arbitrarily depriving an individual of the state-created entitlement to unanimous jury findings on aggravating circumstances before a sentence of death is imposed?
2. Under Harris v. Reed, is it permissible for a federal court to analyze state law and the state court record to determine whether federal claims are barred by state procedural default?
3. Should a federal court waive a procedural default resulting from post-conviction counsel's failure to file a timely appeal when the default would bar any hearing of the petitioner's constitutional claims?
4. Does the deliberate bypass standard of Fay v. Noia continue to apply to a procedural default resulting from a failure to appeal at all?



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. _____

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

Respondent.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing petitioner's federal petition for a writ of habeas corpus, reported at 895 F.2d 139 (4th Cir. January 31, 1990), and the order of the Court of Appeals dismissing the petition for rehearing and rehearing en banc, reported at 1990 U.S. App. Lexis 3189 (4th Cir. February 27, 1990), are reproduced in the Appendix at a7 to a23. The opinion of the United States District Court for the Western District of Virginia, issued on December 6, 1988, is also reproduced in the Appendix at a24 to a40.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of Petitioner's habeas corpus application under 28 U.S.C. § 2254 was entered on January 31, 1990. The Court of Appeals denied the petition for rehearing and rehearing en bance on February 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Also relevant are the Code of Virginia §§ 17-110, 19.264-2 - 19.264-4, reproduced in the Appendix at a1 to a6.

## STATEMENT OF THE CASE

The Trial: On March 18, 1982, petitioner Roger Keith Coleman was convicted in the Circuit Court for Buchanan County, Virginia, for the rape and murder of his sister-in-law, Wanda Fay McCoy. The next day, the jury fixed his sentence as death.

Coleman has consistently maintained his innocence. At trial, Coleman denied committing the crime and testified in support of his alibi for the night of the

crime. His testimony demonstrated that he could not have committed the crime. Several witnesses, including Phillip Van Dyke, corroborated Coleman's testimony. Physical evidence, in the form of Van Dyke's time card from work, could have supported Van Dyke's testimony, but the prosecution did not produce the card to Coleman's counsel. Evidence also showed that no coal dust was found on the victim or in her home, despite the fact that the clothes Coleman wore on the evening of the crime were permeated with coal dust.

After presenting extensive testimony relating to the condition of the victim's body, the prosecution introduced evidence that the blood type of the assailant and that of Coleman was "B," and that hairs found on the victim were "consistent" with hair samples taken from Coleman. To demonstrate that Mrs. McCoy knew her assailant, the Commonwealth presented evidence that there were no signs of forced entry at the McCoy house. However, police investigative reports, which were not produced to Coleman's counsel and consequently were never revealed to the jury, indicated that there was a pry mark on the front door. The prosecution introduced the testimony of Sandra and Gary Stiltner concerning Coleman's whereabouts on the night of the crime to contradict Coleman's and Van Dyke's



testimony, but it withheld from Coleman copies of the Stiltners' pre-trial statements. Those statements, as well as the Van Dyke time card, could have helped Coleman demonstrate to the jury that it should have believed his alibi.

Last, the prosecution introduced the testimony of Roger Matney who testified that Coleman had made a "jailhouse confession" while in jail awaiting trial. Matney's trial testimony contradicted his pre-trial statement, but Coleman's counsel, who had failed to interview Matney before trial, failed to impeach him.

Before trial, Coleman's court-appointed attorneys -- neither of whom had ever defended a murder suspect or conducted a jury trial in a serious criminal case -- interviewed some, but not all, of the police officers who investigated the crime. Coleman's counsel failed to interview Elmer Gist, the state forensic expert, who testified to the relationship between the physical evidence and Coleman, and they failed to find or consult a forensic expert for the defense. Counsel failed to time the route the prosecution claimed Coleman took that night and never sought out other witnesses who could have supported his alibi. They also made no effort to gather any of the evi-

dence of community prejudice indicating that Coleman would not receive a fair trial in Grundy, Virginia.

The jury returned a verdict of guilty at 10:50 p.m. on March 18, 1982. The trial court set the penalty phase of the trial for 9:15 the next morning. Coleman's attorneys never asked him for any help in collecting mitigating evidence for the sentencing phase until after the guilt phase had been concluded, and had not even told Coleman about the penalty phase of a capital case until after the trial had begun. Not surprisingly, Coleman was not able to help immediately after being convicted, and his counsel's presentation at sentencing was weak and unconvincing. The instruction and verdict form given to the jury did not guarantee that the jury would find unanimously either of the statutory aggravating circumstances, as is required by Virginia law. The jury fixed Coleman's punishment at death.

Direct Appeal: Coleman's trial counsel represented him on appeal. The Supreme Court of Virginia affirmed the conviction and sentence of death on September 4, 1983. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983). New counsel prepared and filed on Coleman's behalf a petition for a writ of certiorari to



the United States Supreme Court. The petition was denied on March 19, 1984. 465 U.S. 1109 (1984).

State Habeas Corpus: Coleman filed a petition for a writ of habeas corpus in the Circuit Court of Buchanan County on April 26, 1984, and amended that petition on September 7, 1984. Circuit Judge Glyn Phillips held an evidentiary hearing on November 12 and 13, 1985. At the hearing, Coleman introduced evidence that one of the jurors who sentenced him to death had stated before trial that he wanted to sit on the jury so he could "help burn the S.O.B." Coleman also introduced evidence to demonstrate that he had not received effective representation from his trial counsel at any stage in the proceedings. The factors indicating ineffective representation included the failure to introduce evidence of community prejudice at the venue hearing, to seek out and introduce alibi evidence, to cross-examine effectively the state forensic expert, and to prepare for the penalty phase.

Judge Phillips issued a letter opinion dated June 23, 1986, which stated that he intended to deny Coleman's petition. In denying Coleman's juror bias claim, Judge Phillips never determined whether the juror had stated that he wanted to be on the jury to help execute Coleman. The letter opinion requested that the

Commonwealth prepare a final order denying the petition. On September 4, 1986, Judge Phillips signed the final order exactly as presented by the Commonwealth, even though it included findings not in his letter opinion, and mailed the order to the Clerk of the Buchanan County Court. The Clerk entered the order into the docket book on September 9, 1986, and mailed copies to Coleman's counsel.

State Habeas Corpus Appeal: On October 6, 1986, Coleman filed his notice of appeal to the Virginia Supreme Court. The Commonwealth moved to dismiss the appeal as untimely because the notice had been filed thirty-one days after the date the judge signed the order. Coleman was not on notice that the judge had signed the order until the Clerk had reviewed and entered the order and advised the parties of that entry. In a one paragraph order that listed all the briefs filed before it, the Virginia Supreme Court dismissed the appeal.[1] The order did not state the basis for the dismissal. Coleman's motion for rehearing before the Virginia Supreme Court was denied on June 12, 1987. The United States Supreme Court denied

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1. A copy of the Order is reproduced in the Appendix at a41.



Coleman's petition for certiorari on October 19, 1987. Coleman v. Bass, 484 U.S. 918 (1987).

Federal Habeas Corpus: On April 22, 1988, Coleman filed this federal petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia. The Commonwealth moved to dismiss, claiming that relief was barred on procedural grounds because the Virginia Supreme Court had dismissed Coleman's habeas appeal and that the petition was without merit. Coleman contested the procedural default because, among other things, the Virginia Supreme Court's ruling did not clearly rely upon state law grounds. In addition to demonstrating that his claim had merit, Coleman cross-moved for an evidentiary hearing because the state habeas court had never ruled on certain factual issues critical to its legal conclusions.

In an Opinion and Order dated December 6, 1988, Judge Williams granted respondent's motion to dismiss the petition. Judge Williams found that Coleman's filing of the appeal one day late resulted in a procedural default of his state habeas claims and that Coleman's petition was not meritorious. The District Court also denied Coleman's motion for an evidentiary hearing.

Federal Habeas Corpus Appeal: On January 3, 1989, Coleman filed his notice of appeal from that decision. A Certificate of Probable Cause to Appeal was issued by the District Court on January 4, 1989. The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on January 31, 1990. The Court of Appeals relied primarily on its view that the late-filed appeal was the basis for the Virginia Supreme Court's dismissal such that all Coleman's claims raised in the state habeas proceedings were defaulted. The Court of Appeals discussed the merits only of Coleman's capital sentencing claim. Coleman's petition for rehearing and suggestion for rehearing en banc were denied on February 27, 1990.

## REASONS FOR GRANTING THE WRIT

### I.

### CERTIORARI IS NECESSARY TO DEFINE THE PARAMETERS OF THE DUE PROCESS RIGHT ESTABLISHED IN *HICKS v. OKLAHOMA.*

Coleman was denied liberty without due process of law because the sentencing jury did not find unanimously, as is required by Virginia law, at least one aggravating circumstance. See Hicks v. Oklahoma, 447 U.S. 343 (1980) (federal due process requires that state law right to have particular findings made by the sentencer cannot



be denied arbitrarily); Presnell v. Georgia, 439 U.S. 14 (1978) (striking down death sentence as violative of due process when state supreme court made prerequisite finding that jury should have made). Certiorari is necessary because the Fourth Circuit's application of Cabana v. Bullock, 474 U.S. 376 (1986), to Coleman's case has cast doubt on whether the Hicks right extends beyond the precise factual situation of Hicks. Moreover, this Court's discussion of the Hicks right in Clemons v. Mississippi, 110 S. Ct. 1441 (1990), needs clarification in order to insure that federal due process continues to protect liberty interests stemming from a state right to particular jury findings prior to the imposition of sentence.

#### A. Coleman Was Denied His State Law Right To Juror Unanimity As To The Aggravating Circumstances.

Virginia law permits a sentence of death only when the jury finds unanimously at least one of the two statutory aggravating circumstances of "vileness" and "future dangerousness."[2] Va. Code § 19.2-264.4C; see

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2. Pursuant to the Virginia capital sentencing scheme the "sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant find that there is a probability that the defen- (continued...)

(Linwood E.) Briley v. Bass, 742 F.2d 155, 165-66 (4th Cir.) (discussing need for unanimous finding on at least one aggravating circumstance), cert. denied, 469 U.S. 893 (1984); (James D.) Briley v. Bass, 750 F.2d 1238, 1241 (4th Cir. 1984) ("Virginia law requires that the jury . . . find either of two specific aggravating circumstances proven beyond a reasonable doubt before the death penalty can be imposed."), cert. denied, 470 U.S. 1088 (1985). The instruction and verdict form used in Coleman's case arbitrarily denied him that right because the two aggravating circumstances were separated by the disjunctive "or".[3] As a result, the sentencing jury was

2.(...continued)
dant would commit criminal acts of violence that would constitute a continuing threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed." Va. Code § 19.2-264.2.

3. The verdict form used in Coleman's case read as follows: "We, the Jury, on the issue joined, having found the Defendant Guilty of feloniously killing and murdering Wanda Thompson McCoy during the commission of rape and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the
(continued...)



instructed that unanimity was required only for the ultimate verdict and not for the aggravating circumstances individually: the Coleman jury therefore may have fixed the sentence as death even if only six jurors found the "vileness" aggravating circumstance applied to Coleman while the other six found that the "future dangerousness" circumstances applied to Coleman.

In affirming the sentence, the Virginia Supreme Court erroneously interpreted the instruction and verdict form as meaning that all twelve jurors had found both aggravating circumstances. Coleman v. Commonwealth, 307 S.E.2d 864, 876 (1983), cert. denied, 465 U.S. 1109 (1984). Coleman's case was not like other Virginia cases in which juror unanimity as to both aggravating circumstances was insured through either juror polling or physical alteration of the verdict form. See (Linwood E.) Briley v. Bass, 742 F.2d at 166; (James D.) Briley v. Bass, 750 F.2d at 1246; Frye v. Commissioner, 231 Va. 370, 345 S.E.2d 267, 284 (1986). Because there is a "reasonable likelihood" that the Coleman jury interpreted the instruction as not requiring unanimity on the aggravating circumstances, the Virginia Supreme Court should have

3.(...continued)
evidence in mitigation of the offense, unanimously fix his punishment at death."

assumed that the jury interpreted the instruction as if it did not guarantee unanimity. See Boyde v. California, 110 S. Ct. 1190, 1198 (1990); Mills v. Maryland, 486 U.S. 367 (1988).[4] In the absence of such unanimity, Coleman was denied a state law entitlement to a jury finding on the aggravating circumstances.

B. The Court Should Grant Certiorari To Insure That The Due Process Right Recognized By *Hicks* Applies To All Jury Findings Required For Imposition Of Sentence.

As described in Hicks, a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." 447 U.S. at 346. Arbitrary denial of that expectation violates due process. Id. Coleman's case requires determination of the applicability of the Hicks right concerning the range of sentencing options available to state-mandated findings that are a prerequisite to the

4. The line of cases on interpretation of jury instructions primarily concerns the question of whether a challenged instruction "prevents the consideration of constitutionally relevant evidence." See Boyde, 110 S. Ct. at 1198. The proposition that a sentence should be overturned when there is a reasonable likelihood that a jury misinterpreted an instruction should apply with equal force to insure that a jury does not impose a sentence of death after misapprehending the state law prerequisites to imposition of that sentence.



sentencing determination. In Coleman's case the jurors understood that they had the discretion to sentence him either to death or to a prison term, but they did not understand that before they could exercise their discretion to impose a sentence of death, they were required to find unanimously at least one of the two aggravating circumstances. The failure to instruct a jury properly on what findings must be made in determining the range of sentencing options is equivalent to a failure to instruct the jury properly on those options. If the jury does not properly comprehend the necessary prerequisite findings, then it will not understand the range of sentencing options available. Therefore, the failure to insure that the jury understood the nature of the finding required before it could consider sentencing Coleman to death denied him liberty without due process of law.

The Fourth Circuit denied this due process claim because it believed that Coleman had no Sixth or Eighth Amendment right to any particular jury findings in the imposition of a sentence of death. Appendix at a19-20, 895 F.2d at 146-47. It relied on Cabana v. Bullock, 474 U.S. at 389, to justify its holding that there are no circumstances under which the Constitution requires jury

findings prior to the imposition of the death sentence. Id. at a20, 895 F.2d at 147. The Fourth Circuit's ruling failed to take into account the federal due process requirement recognized in Hicks and elaborated in Bullock. If the Fourth Circuit's interpretation of Bullock is allowed to stand, then the Hicks right will be limited solely to the specific issue of whether the sentencer was adequately informed of the range of available sentencing options. All other findings that a state requires prior to the final sentencing determination could be arbitrarily denied to a particular defendant.

The Court's discussion of Hicks in other cases -- including Bullock -- indicates that the Court did not intend for Hicks to have such narrow applicability. In Bullock, the Court recognized that the Hicks right applies to jury findings other than the ultimate imposition of a sentence. Although the Court denied the Hicks claim, its discussion indicates that the Hicks right applies to jury findings other than the final sentencing determination:

> In Hicks we held only that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Unlike the defendant in Hicks, Bullock had no state-law entitlement at the time of his trial to have the jury (or, indeed, anyone at all) make the Enmund findings. Of course,



> federal law, as later established by Enmund does entitle Bullock to a determination whether he killed, attempted to kill, intended to kill, or intended that lethal force be used; but . . . the federal-law entitlement, unlike the state-law entitlement involved in Hicks, does not specify who must make the findings.

Bullock, 474 U.S. at 387 n.4.[5]

In Clemons v. Mississippi, 110 S. Ct. 1441, 1447 (1990), the Court recognized the applicability of Hicks to other jury findings: "[W]e have recognized that when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes." After stating that there was no Sixth or Eighth Amendment right to have a jury determine the appropriateness of a sentence, the Court considered whether Clemons nonetheless had been denied his federal due process rights because he did not receive that to which he was entitled under state law. Id.

In Clemons, the Court considered whether the Hicks due process right was violated when an appellate

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5. The finding at issue in Bullock was the federally-mandated finding required by Enmund v. Florida, 458 U.S. 782 (1982). As Bullock made clear, each state was free to choose the procedure for satisfying that federal requirement. At issue in Coleman's case is the ability of a state to deny to one defendant a state-created liberty interest in specific jury findings prior to the imposition of sentence.

court reweighed the aggravating and mitigating circumstances after one of the aggravating circumstances considered by the jury was held to be invalid. The Court held there was no constitutional violation only because the Court believed that Mississippi state law provided for appellate courts to perform the reweighing, and not because Hicks did not apply to jury findings prior to the imposition of sentence. Id. The Court noted that the Mississippi court, unlike the Oklahoma court in Hicks, asserted that it had the authority to decide whether the sentence could be affirmed. Id. If state law did not allow appellate courts to engage in the reweighing, then due process would have been violated. See id. at 1448.[6]

Nothing in either Virginia statutory or decisional law allows appellate courts to find that an aggravating circumstance exists when the jury has failed to make such a finding. Here, the Virginia Supreme Court never attempted to find whether the aggravating circumstances existed, nor did it contend that state law provided for such an appellate finding. Its opinion simply assumed, based upon the supposed jury findings, that both

6. In Clemons the Court remanded the case because it was unclear whether or not the Mississippi Supreme Court actually reweighed the aggravating and mitigating circumstances. Clemons, 110 S. Ct. at 1451.



aggravating factors existed. Coleman, 307 S.E.2d at 876.[7] The Virginia Court did not make its own determination that either aggravating factor existed, no doubt because Virginia law provides that the trial jury is obligated to find those facts.

The Fourth Circuit's citation to the Virginia Supreme Court's statement that it had "independently determined" that the sentence of death was appropriate, Coleman, Appendix at a21, 895 F.2d at 147, fails to recognize that the determination related only to those findings that Virginia law requires its Supreme Court to make in every capital case. See Va. Code § 17-110. Review under that provision is limited to three items: (1) consideration of enumerated errors on appeal; (2) consideration of the proportionality of the sentence; and

7. Coleman's trial counsel was ineffective for both its failure to object to the sentencing instructions and its failure to appeal their use. This ineffectiveness constitutes cause for waiving any procedural default resulting from the failure to object. See Murray v. Carrier, 477 U.S. 478 (1986). Had Coleman's counsel done basic research into Virginia capital sentencing law, they would have known that the issue of unanimity of the jury on aggravating circumstances was an issue about which the Virginia Supreme Court had expressed concern. See Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643, 656 (Poff, J., concurring in part, dissenting in part) (stating that use of "or" between aggravating circumstances rendered verdict ambiguous and violated Virginia law), cert. denied, 460 U.S. 1029 (1983).

(3) consideration as to whether the sentence is arbitrarily imposed. Nothing in § 17-110 authorizes the Virginia Supreme Court to find the aggravating circumstances when the jury has failed to find one unanimously, and the Virginia Supreme Court decision does not purport to do so. In no case has the Virginia Supreme Court made an independent determination -- as opposed to affirming a jury determination -- that one of the aggravating circumstances existed.

Certiorari is necessary to ensure that general review by a state supreme court is not used to evade a defendant's due process entitlement to particular jury findings prior to the imposition of a sentence of death. Under the Fourth Circuit's view, there can never be a Hicks violation once a state supreme court undertakes some general review of the sentence. This Court should grant certiorari to reverse that ruling and make clear that Hicks protects more than the ultimate determination of sentence; instead, Hicks stands for the proposition that due process is denied whenever a finding required to be made by a sentencing jury is not made by that jury.



II.

THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE PROPER CONSTRUCTION OF *HARRIS V. REED'S* PLAIN STATEMENT RULE.

In Harris v. Reed this Court held that federal habeas review of federal constitutional claims is barred by procedural default only where the last state court rendering a judgment in the case "clearly and expressly" relied on procedural default as an independent basis for denying relief. 109 S. Ct. 1038, 1042-45 (1989). The Court explained that the mere fact that a petitioner violated a state procedural rule does not bar federal review of his claims. Rather, "'the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" 109 S. Ct. at 1042 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)). Harris made clear that the plain statement requirement applied even to summary orders: "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.'" Id. at 1044 n.12.

The Court reasoned that to hold otherwise would force federal habeas courts "to examine the state court record to determine whether procedural default was argued to the state court" or to analyze state law to determine

whether a procedural bar was applicable to a particular case. Id. at 1044. And because state courts sometimes forgive procedural defaults, federal courts would have to determine not only whether there had been a procedural default but also whether the state had chosen to forgive the default. Id. at 1044 n.11.

Harris v. Reed rejected such federal second-guessing regarding state court proceedings. In so doing, it rejected the rule of most circuits that ambiguous state decisions would be treated as procedural bars if the federal court determined that a procedural default had occurred. See, e.g., Rodriguez v. Scully, 788 F.2d 62 (2d Cir. 1986) (presumption that affirmance without opinion was on procedural grounds); Tweety v. Mitchell, 682 F.2d 461 (4th Cir. 1982) (declining to assume Virginia Supreme Court's dismissal without opinion of habeas petition was on merits), cert. denied, 460 U.S. 1013 (1983); Bates v. Blackburn, 805 F.2d 569 (5th Cir. 1986) (where state court silent as to whether relief denied on procedural grounds federal court would consider (1) state's prior use of procedural default in similar circumstances; (2) history of the case; (3) whether silence suggests reliance on procedural default or review of merits), cert. denied, 482 U.S. 916 (1987).



Most circuits now construe any ambiguity as a decision on the merits. But some, clinging to their old rules, have interpreted Harris v. Reed to allow them to consider state procedural law and the record below in an attempt to decide for themselves whether a claim was procedurally defaulted. The Court should grant certiorari to stop that trend.

A. The Circuits Are Split As To Whether *Harris v. Reed* Permits Federal Courts To Consider Extrinsic Evidence To Determine Whether A Federal Claim Is Barred By State Procedural Default.

The Fourth Circuit's decision in this case marks it as one of three circuits (the Fourth, Fifth and Eleventh) that do not consider Harris v. Reed to have constrained their ability to analyze state law and the lower court record in support of their efforts to find federal claims barred by procedural default. The Virginia Supreme Court's decision dismissing Coleman's habeas appeal listed all the briefs and motions filed with regard to Coleman's appeal. It then concluded that "[u]pon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." Nothing in the order specified that the dismissal was granted on procedural default grounds; it might well have been granted because the court

found the petition to be without substantive merit. See Appendix at a41.

The Fourth Circuit's conclusion that Coleman's claims are barred by procedural default does not purport to be based exclusively on the Virginia Supreme Court's decision. Rather, the Fourth Circuit went beyond the face of the state court opinion and considered extrinsic evidence to conclude that the Virginia Supreme Court's decision was based on procedural grounds. The Fourth Circuit noted that the Commonwealth had based its motion to dismiss upon Virginia Supreme Court Rule 5:9(a) and assumed that this was the basis for the Virginia court's ruling. This assumption was apparently based on the Fourth Circuit's view that Rule 5:9(a) is mandatory and that the Virginia court must have followed it. See Appendix at a11-12, 895 F.2d. at 143. Yet the Virginia Supreme Court's order mentions neither Virginia Supreme Court Rule 5:9(a) nor procedural default. See Appendix at a41. By looking beyond the order to both the state record and Virginia law, the Fourth Circuit developed a rule of construction that cannot be reconciled with Harris v. Reed.[8]

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8. In addition to being contrary to the rule of Harris v. Reed, the Fourth Circuit's conclusion about state (continued...)



Like the Fourth Circuit, the Fifth and Eleventh Circuits have construed Harris to allow federal courts to go beyond the four corners of the last state court judgment by considering extrinsic facts from the state court record or analyzing state procedure to determine whether the state claim was defaulted. See, e.g., Ellis v. Lynaugh, 873 F.2d 830 (5th Cir.), cert. denied, 110 S. Ct. 419 (1989); Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989); Harmon v. Barton, 894 F.2d 1268 (11th Cir. 1990).

In Harmon v. Barton, for example, the Eleventh Circuit found a petitioner's federal claims barred by pro-

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8.(...continued)
law may well have been wrong. The parties had briefed both procedural default and the merits of Coleman's claims, and the Virginia Supreme Court's summary order listed all briefs and dismissed the petition "[u]pon consideration whereof." On at least one occasion, the Virginia Supreme Court has looked at the merits in deciding whether to hear a late-filed appeal. See O'Brien v. Socony Mobil Oil Co., 207 Va. 707, 152 S.E.2d 278 (late appeal not allowed because plaintiff had not been denied any constitutional right), cert. denied, 389 U.S. 825 (1967). Moreover, the Virginia Supreme Court knows how to state clearly and expressly that a decision is based on state law. See, e.g., Dodson v. Director of Corrections, 233 Va. 303, 355 S.E.2d 573, 574 (1987) (quoting order dismissing petition for appeal because "the appeal was not perfected in the manner provided by law. . . . Rule 5:14(a)"). Harris's point is precisely that because federal courts are not equipped to be arbiters of state law, they should nct intrude into the province of state courts by analyzing state law to decide whether a default has occurred. If the state court decision is based on procedural default, it must say so expressly.

cedural default where the last state court to render judgment affirmed without comment a lower court's denial of post-conviction relief.[9] The Eleventh Circuit engaged in an extensive analysis of Florida law, noting that unwritten per curiam affirmances have res judicata but no other precedential value and that the state's streamlined procedure for summary denials of post-conviction relief allows the "clear inference" that the appeals court accepted "not only the judgment but the reasoning of the trial court." 894 F.2d at 1273.[10] The Eleventh Circuit concluded that

9. In direct conflict, several courts have held that affirmances or denials of relief without comment cannot constitute "clear and express" reliance on state procedural grounds. See Nunnemaker v. Ylst, 896 F.2d 1200 (9th Cir. 1990); Coston v. Zimmerman, 725 F. Supp. 846, 849 (E.D. Pa. 1989) (prisoner's "late filing of his petition for allocatur cannot be taken as a procedural default because the Pennsylvania Supreme Court's order merely said it was denied"); Maxwell v. Smith, 722 F. Supp. 7, 8 (W.D.N.Y. 1989) ("It is not possible to hold that an affirmance without opinion clearly and expressly states a court's reliance on a state procedural default."); see also Peterson v. Scully, 896 F.2d 661, 664 (2d Cir. 1990) (Harris "instructs the federal courts on how to interpret ambiguity or silence in state court opinions in habeas corpus cases.").

10. Like the Fourth Circuit in Coleman's case, the Eleventh Circuit may well have misinterpreted state law. The court's analysis rested in part on Fla. R. App. P. 9.140(g), which requires that denials of post conviction relief be reversed and remanded "[u]nless the record shows conclusively that the appellant is entitled to no relief." Harmon, 894 F.2d at 1273. The (continued...)



it would not apply Harris's clear statement requirement to the last state court judgment but would instead look behind the face of that judgment "to the last state court that rendered judgment and provided reasons for the judgment." Id.

The Fifth Circuit has similarly misapprehended Harris's plain statement rule. In Ellis v. Lynaugh, the state habeas court found that petitioner had not properly preserved his claims for review, but alternatively decided that each claim failed on the merits. The state appellate court denied relief without written order. The Fifth Circuit held that federal review was barred by procedural default. 873 F.2d at 838.[11] In McCoy v. Lynaugh, 874 F.2d 954 (5th Cir. 1989), and Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989), the Fifth Circuit further developed its skewed view of Harris. In McCoy, the court acknowledged

10.(...continued)
Eleventh Circuit was wrong to presume from this rule that the denial of relief was based on procedural grounds. The Florida court might simply have evaluated the merits and decided that the record showed conclusively that petitioner was not entitled to relief.

11. The Ninth Circuit has expressly declined to follow Ellis v. Lynaugh, suggesting that a "denial of relief without written order" cannot constitute a plain statement under Harris v. Reed. Nunnemaker v. Ylst, 896 F.2d 1200, 1204 n.5 (9th Cir. 1990). See note 9, supra.

that although the petitioner had challenged the exclusion of several prospective veniremen in his state habeas petition, the state habeas courts had not addressed the issue. 874 F.2d at 954. Conceding that a literal reading of Harris would not permit a finding of procedural default, the Fifth Circuit nonetheless found the issue procedurally barred. The court based its decision not on the decision of the habeas court, the last state court rendering judgment in the case, but rather on the decision on direct appeal, where the issue had been found untimely. Id.; cf. id. at 967-68 (Williams, J., specially concurring) (no procedural bar because no clear statement by the state habeas court).

In Russell v. Lynaugh, the Fifth Circuit took its construction one step further. It held petitioner's challenge to the exclusion of a venire member defaulted, relying once again on the state court's opinion on direct appeal rather than on the habeas court's judgment. 892 F.2d at 1208-11. Reliance on the decision on direct appeal was particularly unwarranted because the challenge to that particular juror's exclusion had not been made on direct appeal -- it was not raised until state habeas, at



which time relief was denied without opinion.[12] While the majority's opinion in Russell paid lip service to the dictates of Harris v. Reed, Judge Johnson, in a stinging dissent, noted that the majority had "effectively ignore[d]" Harris and that its approach intruded into the province of the state courts, unduly burdened federal courts and threatened the uniform development and application of federal law. Id. at 1217.

The Sixth and Ninth Circuits have squarely rejected the "extrinsic evidence" approach adopted by the Fourth, Fifth and Eleventh Circuits. They have construed Harris v. Reed to require federal review of the merits in the absence of a clear and express statement by the last state court rendering judgment in the case that its decision is based on procedural default. See, e.g., Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989); Nunnemaker v. Ylst, 896 F.2d 1200 (9th Cir. 1990) (expressly declining to follow the Fifth Circuit's decision in Ellis v. Lynaugh); Durosko v. Lewis, 882 F.2d 357 (9th Cir. 1989),

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12. The opening paragraph of the Fifth Circuit's opinion in Russell perhaps sheds some light on that court's unwillingness to apply the plain statement rule correctly: "As is usually true in most of these death penalty cases, Russell's innocence is not even remotely suggested. As is also true in most of these cases, the wheels of justice have moved very, very slowly over more than a decade." 892 F.2d at 1206-07.

cert. denied, 110 S. Ct. 1930 (1990). Both the Seventh and the Second Circuits have also made clear their unwillingness to analyze state law to decide whether a procedural default bars federal review. See Rogers-Bey v. Lane, 896 F.2d 279 (7th Cir. 1990) (rejecting Seventh Circuit's pre-Harris approach which allowed federal courts to ignore the "literal language" of state court opinions when making procedural default determination); Peterson v. Scully, 896 F.2d 661, 663 (2d Cir. 1990) (rejecting argument that it should find claim procedurally barred because a holding that the state court reached the merits "would amount to a declaration that the court . . . committed an error of elementary state law"); Lopez v. Scully, 716 F. Supp. 736 (E.D.N.Y. 1989) (where motion for post-conviction relief denied without opinion, no procedural bar).

Indeed, in Hill v. McMackin the Sixth Circuit considered a factual situation and order similar to that of the Virginia Supreme Court in this case and reached a conclusion directly opposed to that of the Fourth Circuit. It concluded that the ambiguity of the state court order denying leave to file a late appeal precluded a finding of procedural default barring federal review of petition-



er's claims.[13] The Sixth Circuit rejected the analysis of the district court, which had been "persuaded by the government's argument that the absence in the court's order of customary language indicating that the court was relying on substantive grounds to deny leave to appeal effectively rendered the order one based substantially on procedural grounds." 893 F.2d at 813. Rather, the Sixth Circuit concluded that the ambiguous state order had to be treated as a decision on the merits rather than on procedural default grounds. It proceeded to consider Hill's claims on the merits. Id. at 814; see also Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990) (state court ruling that "other assertions of error are either without merit or not preserved for appellate review" does not bar federal review), petition for cert. filed, (No. 89-7262) (Apr. 17, 1990).

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13. The state court order in McMackin read as follows:

> This case is pending before the Court on the filing of a motion for leave to appeal from the Court of Appeals for Columbiana County and as an appeal of right from same said Court. Upon consideration of appellant's motion for leave to file delayed appeal,
>
> IT IS ORDERED by the Court that said motion be, and the same is hereby denied.

893 F.2d at 813.

Similarly, in both Durosko v. Lewis, 882 F.2d 357 (9th Cir. 1989), cert. denied, 110 S.Ct. 1930 (1990), and Nunnemaker v. Ylst, 896 F.2d 1200 (9th Cir. 1990), the Ninth Circuit steadfastly refused to look behind the face of the order of the last state court rendering judgment in a case, even when that court merely denied relief without opinion. In Nunnemaker, the Ninth Circuit specifically declined to follow the Fifth Circuit's contrary conclusion in Ellis v. Lynaugh. The rule of construction developed by both the Sixth and the Ninth Circuits is in direct conflict with that of the Fourth, Fifth and Eleventh Circuits.[14]

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14. The lower federal courts are also confused as to how to identify the last state court "rendering judgment." Compare Arce v. Smith, 889 F.2d 1271 (2d Cir. 1989) (applying plain statement rule to post-conviction trial court's opinion and ignoring decision of appellate court denying leave to appeal) with Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989) (applying plain statement rule to denial of motion to file late appeal); see also Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990). The Court should resolve this issue by holding that the plain statement rule should be applied to the last state court that must render a decision in order to exhaust state remedies. This will entail an evaluation of state law, but federal courts must always evaluate state law to determine when remedies are exhausted. See Harris, 109 S. Ct. at 1046 (O'Connor, J., concurring). Once remedies are exhausted, a subsequent procedural default is irrelevant. Coleman was not required to appeal the state habeas denial to the Virginia Supreme Court to exhaust his remedies, because that court's consistent refusal to hear discretionary
(continued...)



B. Because The Lower Federal Courts Are Regularly Confronted With The Important Task Of Deciding Whether Review Of A Federal Claim Is Barred By State Procedural Default, This Court Should Clarify The Proper Construction Of *Harris v. Reed.*

Federal habeas courts have a responsibility to release state prisoners detained in derogation of their federal constitutional and statutory rights. See, e.g., Johnson v. Avery, 393 U.S. 483, 485 (1969) ("This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . [and] has steadfastly insisted that 'there is no higher duly then to maintain it unimpaired.'") (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)). However, in deference to state judicial processes, the federal courts have developed a principle of comity that, with narrow exceptions, provides that they will not consider claims that state courts have refused to consider on procedural default grounds. This doctrine prevents state prisoners from bypassing state courts in favor of the federal system.

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14.(...continued)
appeals of denials of habeas relief renders such appeals futile. The Fourth Circuit should therefore have looked to the state habeas trial court opinion to determine whether Coleman defaulted on his federal claims. Because that court reached the merits of most of Coleman's federal claims, the federal courts should also reach the merits.

However, where a state court's denial of relief is premised not on procedural default, but rather reflects the state court's determination of the merits of a petitioner's federal claims, federal court deference to a perceived default serves no legitimate purpose. Indeed, where the state court did not rely on default, federal court deference abrogates the federal court's responsibility to determine whether such prisoners are detained -- or face execution -- in derogation of their federal constitutional and statutory rights.

By putting the onus on the state court to state "clearly and expressly" that its decision is based on procedural default, Harris furthers three goals: (1) it protects federal courts from the burden of evaluating the record and analyzing state law to determine whether a state procedural bar might underlie the state court's decision and allows them to quickly determine what federal issues are presented for review; (2) it prevents federal courts from unduly intruding into the province of the state courts; and (3) it prevents state prisoners from being wrongly deprived of federal review of their constitutional claims. See, e.g., Harris v. Reed, 109 S. Ct. at 1044; Michigan v. Long, 463 U.S. 1032, 1040-42 (1983); Russell v. Lynaugh, 892 F.2d at 1218-19 (Johnson, J., dis-



senting). State courts are entitled to rely on Harris. Where state court opinions do not state that they are based solely on state procedural grounds, it should be presumed that they are not. A federal court should not second guess the state court by engaging in its own analysis of state law.

The importance of a resolution of the conflict regarding the proper construction of Harris v. Reed is evidenced by the flood of opinions construing and applying this Court's decision. Harris issues confront the federal courts on an almost daily basis. In the 15 months since the decision was issued, it has been cited in more than one hundred reported decisions. The raft of opinions construing Harris and the direct conflict between circuits that believe federal courts may go beyond the face of the opinion to analyze state law and the state court record and those that interpret Harris v. Reed more rigorously, holding that federal review is not barred unless the state court has stated "clearly and expressly" that its decision is based on procedural default, make it necessary for this Court to intervene and clearly set forth the proper standard.

Failure to intervene at this time will undercut one of the fundamental goals of the plain statement rule:

the promotion of uniformity in federal law. See Michigan v. Long, 463 U.S. at 1040 ("there is an important need for uniformity in federal law, and . . . this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion"). The need for uniformity is nowhere more important than in capital cases. If prisoners incarcerated in states within some circuits are able to get federal review of federal claims on different terms from those incarcerated in other circuits, the consistency crucial to the constitutional imposition of capital punishment will be lost. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all").

This case is an appropriate vehicle for resolution of the circuit court conflict regarding the proper construction of Harris v. Reed. Roger Coleman has been sentenced to death. In a state court order that is anything but "clear and express," the Virginia Supreme Court denied the relief he requested. Because the Fourth Circuit went beyond the ambiguous decision to find that Coleman's state habeas counsel had filed a notice of appeal one day late, and because the federal court's



analysis of state law convinced it that the Virginia court was likely to have based its decision on procedural default, Coleman has been denied federal habeas review of his claims.

Certiorari should be granted in this case to clarify that federal habeas courts should leave analysis of state procedural default to the state courts. A federal court's determination that a claim is barred by procedural default must be based on the last state court decision itself, not on consideration of extrinsic facts from the record or on an independent federal court analysis of state law. Where the decision of the last state court rendering judgment in the case does not "clearly and expressly" rely on procedural default, federal review is not barred and is therefore mandated. Any other rule unduly burdens the federal courts and allows them to invade the province of the state courts to make determinations of state law. Moreover, it fails to provide state prisoners with the full benefits of the federal law safeguards to which they are entitled.

III.

THE COURT SHOULD DETERMINE THAT INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL MAY CONSTITUTE "CAUSE" FOR WAIVING A PROCEDURAL DEFAULT.

Roger Coleman lost his habeas appeal to the Virginia Supreme Court because counsel filed the notice of appeal one day late. As a result of this error, virtually all of Coleman's federal claims were procedurally defaulted. The Fourth Circuit declined to waive the procedural default resulting from counsel's ineffective performance because Coleman had no constitutional right to counsel on post-conviction review.

This decision was based on the Fourth Circuit's interpretation of Murray v. Carrier, 477 U.S. 478 (1986), to limit the use of deficient attorney performance as "cause" to the circumstances in which there is a constitutional right to counsel. In so holding, the Fourth Circuit joined a number of federal courts that have allowed attorney ineffectiveness to bar federal review of federal claims. Other courts have interpreted Murray v. Carrier, more broadly, holding that if attorney conduct is deficient under the performance standard enumerated in Strickland v. Washington, 466 U.S. 668 (1984), it will constitute cause whether or not the petitioner had a constitutional right to counsel at the time the default



occurred. The latter approach is preferable because otherwise, prisoners will routinely be denied access to the federal courts for vindication of their federal claims through no fault of their own.

At the very least the Court should find cause whenever ineffective assistance of post-conviction counsel prevents the assertion of any claim that can be raised only on post-conviction review. Under Virginia law, certain constitutional claims, including assertions of Sixth Amendment ineffective assistance of counsel, can be raised only on collateral review. Where a state restricts a petitioner's ability to raise a constitutional claim to post-conviction proceedings, ineffective assistance of counsel in those proceedings must constitute cause.

A. Post-Conviction Review Is Critical For The Assertion Of Certain Federal Rights.

Post-conviction review is critical to the effective presentation of constitutional claims. "[C]ollateral review will frequently be the only means through which an accused can effectuate the right to counsel." Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (holding petitioner's Sixth Amendment claim related to failure of counsel to assert Fourth Amendment argument not barred by Stone v. Powell, 428 U.S. 465 (1976)). Denying petitioner the

right to litigate his ineffectiveness claims in federal habeas proceedings would "severely interfere with the protection of the constitutional right asserted by the habeas petitioner." Kimmelman, 477 U.S. at 378; see also Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting) (noting need for counsel on habeas because "some claims [including ineffectiveness of counsel] ordinarily heard on direct review will be relegated to post-conviction proceedings").

The need to waive defaults resulting from the ineffectiveness of post-conviction counsel is even more pronounced for Virginia petitioners who have defaulted on Sixth Amendment ineffectiveness of counsel claims. Under Virginia law, a Sixth Amendment claim of ineffective assistance of counsel cannot be raised during the direct appeal of a conviction. See Walker v. Mitchell, 299 S.E.2d 698, 699 (Va. 1983).[15] A prisoner in Virginia is thus precluded from asserting one of the most significant constitutional claims in a proceeding at which he has a

15. Prior to July 1, 1985, no claim of ineffectiveness of counsel could be raised on direct review in Virgina. See Dowell v. Commonwealth, 351 S.E.2d 915, 919 (Va. App. 1987) (citing Walker v. Mitchell). Since then, the only ineffectiveness claim that can be raised on direct review is one in which "all matters relating to such issue are fully contained within the record of the trial." Va. Code § 19.2-317.1.



constitutional right to counsel. He is left with the inadequate forum of a post-conviction review without a guarantee of effective counsel. The four dissenters in Murray v. Giarratano recognized the special problem Virginia creates by limiting litigation of an ineffectiveness claim to collateral review. 109 S. Ct. 2765, 2778-79 (1989) (Stevens, J., dissenting). They accordingly believed that inmates on death row should have counsel for their post-conviction proceedings.

The Court has held that there is no constitutional right to counsel in post-conviction proceedings, and petitioner does not seek to relitigate that issue. However, the question of whether an attorney's fundamental mistakes that preclude state review should also preclude federal review of a petitioner's claims is very different from the one decided in Pennsylvania v. Finley, 481 U.S. 551 (1987), and Murray v. Giarratano. A determination that something constitutes cause simply means that the federal courts will hear federal claims, while a finding that a constitutional right exists creates independent rights and remedies. As Francis v. Henderson, 425 U.S. 536, 538-39 (1976), made clear, state procedural defaults do not deprive federal courts of jurisdiction. Rather, federal courts enforce state procedural defaults as a

matter of comity. The interest in comity can be outweighed by the need to vindicate important constitutional rights. A state procedural default caused by a post-conviction attorney's egregious misconduct -- misconduct that would constitute ineffective assistance of counsel if the petitioner had the right to counsel -- should not preclude all federal review but rather should constitute cause for waiving a procedural default.

B. The Federal Courts Are Divided As To Whether Ineffectiveness Of Post-Conviction Counsel Can Constitute Cause.

The representation Coleman received in his state post-conviction proceedings was objectively deficient in that his counsel failed to file a timely appeal from the denial of his state habeas corpus petition. As a result of this failure to file a timely appeal, Coleman was precluded from doing that which he always intended to do: effectively pursue his federal claims all the way through the Virginia court system. The Fourth Circuit declined to waive the procedural default that resulted from this deficient representation because it believed that Murray v. Carrier allows attorney ineffectiveness to constitute cause only when the deficient performance occurs at a time that petitioner has a constitutional right to counsel. Appendix at a14, 895 F.2d at 144. Accordingly, the court



did not reach the merits of any of Coleman's federal claims.

The other federal courts that have refused to waive procedural defaults caused by the ineffectiveness of post-conviction counsel have also based their refusal on an unnecessarily narrow reading of Murray v. Carrier. These courts have construed Murray as meaning that the only time attorney error can constitute cause is when the petitioner had a constitutional right to counsel at the time the error was committed. See Toles v. Jones, 888 F.2d 95 (11th Cir. 1989) (petitioner had no right to coram nobis counsel so there cannot be cause due to coram nobis counsel's ineffectiveness); Buelow v. Dickey, 847 F.2d 420 (7th Cir. 1988) (no waiver of a procedural default based upon ineffectiveness of discretionary appellate counsel), cert. denied, 109 S. Ct. 1168 (1989); Whitten v. Allen, 727 F. Supp. 28 (D. Me. 1989) ("[p]etitioner must bear the risk of attorney error resulting in his procedural default"); Ortiz v. O'Leary, No. 88 C 9493, 1989 U.S. Dist. Lexis 4659 (N.D. Ill. Apr. 24, 1989).

Other federal courts have not read Murray v. Carrier so narrowly. Instead, these courts have recognized the distinction between the ability to raise ineffectiveness of counsel as a separate claim and the use of

ineffectiveness as "cause" to justify the waiver of a procedural default. In Harper v. Nix, 867 F.2d 455 (8th Cir.), cert. denied, 109 S. Ct. 3194 (1989), for example, the Eighth Circuit analyzed counsel's performance on post-conviction review to determine if it was sufficiently deficient to constitute cause. See Shook v. Clarke, 894 F.2d 1496, 1497 (8th Cir. 1990) ("Ineffective assistance of counsel during post-conviction proceedings 'can constitute cause under Wainwright thus avoiding the procedural bar.'" (quoting Shaddy v. Clarke, 890 F.2d 1016, 1018 n.4 (8th Cir. 1989))); Thomas v. Armontrout, No. 85-0096-CV-W-8-P, 1989 U.S. Dist. Lexis 1530 (W.D. Mo. Feb. 8, 1989) (evaluating whether post-conviction counsel's performance constituted cause); Bolder v. Armontrout, 713 F. Supp. 1558, 1564 (W.D. Mo. 1989) (finding cause through post-conviction counsel's ineffectiveness).

In Madyun v. Young, 852 F.2d 1029, 1033 n.3 (7th Cir. 1988), the Seventh Circuit construed Murray v. Carrier as holding only that the behavioral aspect of an ineffective assistance of counsel claim, i.e., whether performance was deficient, applied. The Madyun court did not find it necessary for there to be a separate constitutional violation prior to using attorney ineffectiveness as cause to waive the default:



> [t]he crucial determination in deciding whether counsel's failures provide cause for a default is not at what stage in the proceedings those failures occurred, but rather how seriously deficient was counsel's performance.

Madyun, 852 F.2d at 1033 n.2. The Madyun court noted that there is a distinction be-tween when attorney ineffectiveness can be cause and when it can be a separate basis for relief. Id.[16]

The Court should affirm the view taken by the courts that focus on the performance of counsel, without regard to whether there is a constitutional right to counsel. It is one thing to hold that there is no constitutional right to counsel for post-conviction proceedings; it is quite another to preclude any real review of a petitioner's federal claims in federal court proceedings because his post-conviction counsel acted negligently. This Court should find that certain attorney errors on

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16. Another Seventh Circuit panel has suggested that because post-conviction counsel's performance could constitute an external impediment to the assertion of federal claims, it should suffice to waive procedural default. In Morrison v. Duckworth, 898 F.2d 1298 (7th Cir. 1990), the court stated that deficient performance by post-conviction counsel would not constitute cause under the "ineffective assistance of counsel" rubric because there is no right to counsel in post-conviction proceedings." However, the Morrison court believed that post-conviction ineffectiveness logically fit into the more general "external impediment" justification for cause.

collateral review, like the error in Coleman's case, constitute "cause" to waive the procedural default.

C. The Virginia Rule That Limits Ineffective Assistance Of Counsel Claims To Collateral Review Creates An External Impediment That Should Constitute Cause.

As the Murray v. Giarratano dissenters recognized, the strict limitation placed on ineffectiveness claims that can be raised on direct review makes it troubling that there is no right to counsel on collateral review. 109 S. Ct. at 2778-79. The Virginia rule for raising an ineffectiveness claim makes it likely that petitioners will consistently be denied the right to litigate their Sixth Amendment claims in federal court. The comity concerns that led to the creation of the procedural default doctrine are not served when the state has erected such a barrier to the full assertion of federal rights. See, e.g., Alcorn v. Smith, 781 F.2d 58, 63 (6th Cir. 1986) ("An inadequate state forum for presenting sufficiency of the evidence claims will constitute 'cause' for the procedural default."); Jurek v. Estelle, 593 F.2d 672, 684 (5th Cir. 1979), vacated on other grounds 623 F.2d 929 (1980) (en banc), cert. denied, 450 U.S. 1001 (1981) (cause where the state forum is "insufficiently hospitable to the federal claim"); see also Morrison v. Duckworth,



898 F.2d 1298 (7th Cir. 1990). The Court should at least make sure that petitioners do not lose their ability to raise federal claims in federal court based upon the ineffectiveness of counsel in the first state forum in which the federal claim can be raised. Instead, defaults of such claims resulting from counsel's ineffectiveness should be waived.

IV.

THE COURT SHOULD DETERMINE THAT THE *FAY v. NOIA* "DELIBERATE BYPASS" STANDARD REMAINS THE RULE FOR WAIVING DEFAULTS RESULTING FROM A FAILURE TO APPEAL AT ALL.

The Fourth Circuit applied the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), rather than the "deliberate bypass" test of Fay v. Noia, 372 U.S. 391 (1963), to determine whether the procedural default resulting from petitioner's late-filed appeal should be waived. Coleman, Appendix at a13-14, 895 F.2d at 143. In so doing, the Court of Appeals decided what this Court declined to decide in Murray v. Carrier: whether the deliberate bypass standard continues to apply to failures to appeal at all.[17]

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17. The Fourth Circuit found that, because Coleman intended to appeal but simply failed to do so in a timely manner, the Fay decision did not apply. Appendix at a13-14, 895 F.2d at 143-44. Yet, the (continued...)

In Murray v. Carrier this Court "express[ed] no opinion as to whether counsel's decision not to take an appeal at all might require treatment" under the cause and prejudice standard. 477 U.S. at 492. In light of the Fourth Circuit's ruling and the rulings made by other circuits on this issue, the Court should grant certiorari to reaffirm that deliberate bypass is the proper standard to apply to a failure to appeal at all. Deliberate bypass should be the standard for failures to appeal. The decision not to take an appeal is so fundamental that it should not result in a procedural default of an individual's federal claims absent a knowing and intelligent waiver by that individual. See Sykes, 433 U.S. at 92, (Burger, C.J., concurring).

The lower federal courts have split on the issue of the proper waiver standard to apply to failures to appeal at all. Courts in the First, Eighth, Tenth, and

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17.(...continued)
purpose behind the deliberate bypass standard is to determine whether a failure to appeal was knowing and intentional. Under the Fourth Circuit's view, the deliberate bypass standard would apply only if a petitioner in fact deliberately bypassed the state courts. By creating this specious distinction, the Fourth Circuit did not address the continued viability of its holding in Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977), that a failure to appeal should continue to be judged under the deliberate bypass standard.



Eleventh Circuits have applied the deliberate bypass standard to failures to appeal, even after Wainwright v. Sykes. See Presnell v. Kemp, 835 F.2d 1567, 1577 (11th Cir.) ("We have suggested that Fay's deliberate bypass test still applies to claims involving fundamental decisions that should not, or realistically cannot be, delegated to counsel, such as the defendant's decision to plead guilty, waive his right to a jury trial, or take an appeal.") (emphasis added), cert. denied, 109 S. Ct. 882 (1989); Worthen v. Meachum, 842 F.2d 1179 (10th Cir. 1988) (reversing use of cause and prejudice to determine whether a procedural default resulting from a failure to appeal can be waived); Ashby v. Wyrick, 693 F.2d 789 (8th Cir. 1982) (evidentiary hearing required to determine if petitioner had established claim of no deliberate bypass in failure to appeal); Power v. Johnson, 678 F. Supp. 1195 (E.D.N.C. 1988) (refusing to apply cause and prejudice test when counsel misinformed client about availability of review); Dionne v. Tierney, 667 F. Supp. 36 (D. Me. 1987) (applying Fay to late-filed appeal in post-conviction proceeding); see also Forman v. Smith, 633 F.2d 634, 640 & n.8 (2d Cir. 1980) (deliberate bypass may be appropriate standard where "the procedural default eliminates an entire stage of court proceedings, while Sykes applies to

procedural defaults that abandon only a specific claim"), cert. denied, 450 U.S. 1001 (1981).

By contrast, other circuits have applied the cause and prejudice test to failures to appeal at all. See, e.g., Ewing v. McMackin, 799 F.2d 1143, 1150-51 (6th Cir. 1986); Hughes v. Idaho State Board of Corrections, 800 F.2d 905 (9th Cir. 1986) (failure to appeal on collateral review judged under cause and prejudice test); Clark v. Texas, 788 F.2d 309 (5th Cir. 1986) (cause and prejudice applied to failure to appeal on direct review).

An analysis of the interests involved demonstrates that deliberate bypass remains appropriate for analyzing the effect of a petitioner's failure to take an appeal is the correct approach. See, e.g., Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1223-24 (1986). As Chief Justice Burger explained in his concurring opinion in Sykes, the deliberate bypass standard is inappropriate for decisions made at trial, which of necessity must be entrusted to counsel and are often made without consultation with the client. Wainwright v. Sykes, 433 U.S. at 92-94 (Burger, C.J., concurring.) However, where "important rights h[a]ng in the balance of the defendant's own decision, . . . a waiver



impairing such rights must be a knowing and intelligent decision by the defendant himself." Id. at 92.

The fact that Coleman's late-filed appeal was on collateral review does not affect the analysis. In Murray v. Carrier, the Court held that the same procedural default rules should apply whether the default occurs at trial, on appeal, or during collateral review. 477 U.S. at 491. In addition, "habeas corpus . . . actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." Bounds v. Smith, 430 U.S. 817, 827 (1977) (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969)). Thus the decision not to appeal a habeas judgment is a fundamental choice that only the petitioner himself can make. The Eighth Circuit has properly applied the Fay standard to failures to take a collateral appeal. White Hawk v. Solem, 693 F.2d 825, 826 n.2 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983).[18]

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18. Those circuits that apply different procedural default rules for direct and collateral proceedings have failed to recognize both the fundamental importance of habeas appeals and this Court's statement in Murray that the same procedural default rules should apply at all stages of the proceedings, including collateral review. See, e.g., Alexander v. Dugger, 841 F.2d 371 (11th Cir. 1988) (applying cause and prejudice to failure to appeal collateral review even though Presnell v. Kemp applied Fay for failure to appeal on direct).

Since 1977, when Wainwright v. Sykes was decided, this Court has left open the issue of Fay v. Noia's continued viability to failures to appeal at all. Sykes, 433 U.S. at 88 n.12. The circuit courts have failed to reach a consensus as to whether the Fay v. Noia decision remains good law. Petitioner's case squarely presents the issue of which waiver standard should apply to a failure to appeal. The fundamental nature of the decision to pursue an appeal should not be lost absent a knowing decision to waive the appeal. Coleman made no such decision. He should not lose the right to have a federal court review his federal claims.

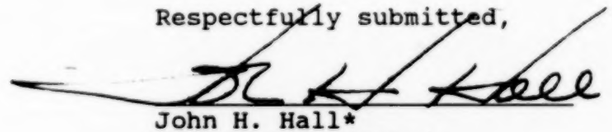


## CONCLUSION

For the foregoing reasons, Petitioner Roger Keith Coleman respectfully requests that his petition for a writ of certiorari be granted to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
May 29, 1990

Respectfully submitted,



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Affidavit of Service

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

DANIEL JOEL GOLDSTEIN, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am associated with the law firm of Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022.

2. I caused a copy of the annexed Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit in the case captioned Roger Keith Coleman, Petitioner v. Charles E. Thompson, Warden, Mecklenburg Correctional Center of the Commonwealth of Virginia, Respondent to be served by first-class mail, postage pre-paid, on Donald R. Curry, Esq., Attorney for Respondent, 101 No. Eighth Street, Richmond, Virginia 23219 (telephone: (804) 786-2071) on the 29th day of May, 1990.

3. I declare under penalty of perjury that the foregoing is true and correct.

Daniel J. Goldstein

Sworn to before me this
29th day of May, 1990

Notary Public

THELMA GARVIN
Notary Public, State of New York
No. 03-4706714
Qualified in Bronx County
Commission Expires May 31, 1992

4. For the foregoing reasons, the motion for leave to proceed in forma pauperis should be granted.

Dated: New York, New York
May 29, 1990

Respectfully submitted,

John H. Hall*
Daniel J. Goldstein
Marianne Consentino
Richard G. Price

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New York, New York 10022
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Attorneys for Petitioner
Roger Keith Coleman

*Counsel of Record

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

---

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES THOMPSON, WARDEN,
MECKLENBURGCORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA

Respondent.

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**APPENDIX**

**APPENDIX A**

Relevant Statutory Provisions

Code of Virginia

**§ 17-110.1. Review of death sentence.**

A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death;

2. Commute the sentence of death to imprisonment for life; or

3. Remand to the trial court for a new sentencing proceeding.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument. (1977, c. 492; 1983, c. 519.)



**§ 19.2-264.2. Conditions for imposition of death sentence.**

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

**§ 19.2-264.3. Procedure for trial by jury.**

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lessor punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.



**§ 19.264.4. Sentence proceeding.**

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

1. "We, the jury, on the issue joined, having found the defendant guilty of (here set our statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed . . . foreman" or

2. "We, the jury, on the issue joined, having found the defendant guilty of (here set our statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed . . . foreman" or

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.



PUBLISHED

FILED

JAN 31 1990

# UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

No. 89-4002

ROGER K. COLEMAN

Petitioner - Appellant

v.

CHARLES THOMPSON, Warden

Respondent - Appellee

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, Senior District Judge. (CA-88-125-A)

Argued: October 2, 1989 Decided: January 31, 1990

Before CHAPMAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Daniel Joel Goldstein (John H. Hall; Marianne Consentino, DEBEVOISE & PLIMPTON, on brief) for Appellant. Donald Richard Curry, Senior Assistant Attorney General (Mary Sue Terry, Attorney General, on brief) for Appellee.

BUTZNER, Senior Circuit Judge:

Roger Keith Coleman, a Virginia prisoner sentenced to death, appeals the district court's denial of his petition for a writ of habeas corpus. The district court concluded that Coleman's claims were procedurally defaulted. We affirm.

Coleman was convicted on March 18, 1982, in the Circuit Court of Buchanan County, Virginia, of rape and capital murder. The opinion affirming his conviction recounts the facts about the crime and the evidence introduced for the imposition of a death sentence. See Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied, 465 U.S. 1109 (1984). Coleman then applied for a writ of habeas corpus in the Circuit Court of Buchanan County. After an evidentiary hearing, the court denied the writ. The Supreme Court granted the state's motion to dismiss Coleman's appeal. Again, the Supreme Court denied certiorari. Coleman v. Bass, 484 U.S. 918 (1987). Coleman next petitioned for a writ of habeas corpus in the federal district court, setting forth 11 claims asserting the invalidity of his conviction and sentence. The district court denied relief without an evidentiary hearing, and this appeal followed.

I

In his brief, Coleman states the first issue on appeal as follows:



> Did the District Court err in finding that federal review of Coleman's claims is barred: (a) when dismissal by the Virginia Supreme Court was based on the novel reading of an ambiguous procedural rule, (b) when Coleman's late filing of his notice of appeal did not represent a deliberate bypass of the courts, and (c) when application of procedural default rules to counsel's error in filing the appeal one day late would deny Coleman meaningful access to the courts?

The district court found that the Virginia Supreme Court had dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Consequently, the district court dismissed as procedurally defaulted the following seven claims, which were raised only in the state habeas proceeding and not on direct appeal:

> At least one member of the jury, George Marrs, failed to disclose his preconceived opinion of Coleman's guilt.
>
> Coleman was not afforded reasonably effective assistance of counsel.
>
> Jurors were improperly excluded because of their opposition to imposition of the death penalty.
>
> The prosecution failed to disclose exculpatory evidence.
>
> The prosecution's closing argument denied Coleman a fair trial.
>
> The jury instructions at the penalty stage were constitutionally inadequate.
>
> Virginia's capital murder statute and sentencing procedures are unconstitutional facially and as applied, under the Eighth and Fourteenth Amendments to the Constitution of the United States.

The district court premised its finding of procedural default on the Virginia Supreme Court order which dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Rule 5:9(a) of the Virginia Supreme Court provides:

> No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

The state habeas court entered its order denying a writ of habeas corpus on September 4, 1986. Coleman filed his notice of appeal on October 7, 1986, one day late, counting from September 5 and omitting Saturday and Sunday, October 4 and 5. Va. Code Ann. §§ 1-13.3 and 1-13.3:1 (1987). Two weeks later Coleman moved the state habeas court to correct the date of final judgment from September 4 to the date the clerk recorded the order in the common law order book, September 9. The court denied the motion, stating in its order "final judgment was entered on September 4, 1986."

On December 4, 1986, Coleman filed a petition for appeal in the Virginia Supreme Court. The state responded by moving to dismiss the petition on the sole ground that Coleman had filed his notice of appeal more than 30 days after the entry of final judgment. Both sides then briefed the motion and the merits of the petition. The Supreme Court ruled: "[T]he motion to dismiss is granted and the petition for appeal is dismissed."

A state habeas petitioner who fails to meet the requirements of state procedural law, and who has his petition dismissed on that



basis by the last state court to review it, loses federal review of the federal claims raised in the state petition in the absence of cause and prejudice or a fundamental miscarriage of justice. Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986). Procedural default can be invoked by the state only when "the state court's opinion contains a 'plain statement that [its] decision rests upon adequate and independent state grounds.'" Harris v. Reed, 109 S. Ct. 1038, 1042 (1989) (quoting Michigan v. Long, 463 U.S. 1032, 1042 (1983)).

Coleman argues that the Virginia Supreme Court did not clearly and expressly rely on a state procedural rule in dismissing his petition for appeal. He points to the Court's recital that among other papers it considered the briefs that had been filed in opposition to the petition.

Coleman's argument lacks a factual basis. The Supreme Court complied with the "plain statement" rule that Harris made applicable to habeas corpus proceedings. The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal. The Court recites that it considered all of the papers filed by the parties. The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.[1]

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[1]The order states:

> On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.
>
> Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition

The district court properly concluded that the failure to comply with Rule 5:9(a) was an adequate ground to apply the bar of procedural default. The rule is mandatory. Vaughan v. Vaughan, 215 Va. 328, 210 S.E.2d 140 (1974). The mandatory nature of the rule does not make it unconstitutional. Dismissal of an application for discretionary review because it is untimely does not deprive the applicant of due process of law. Wainwright v. Torna, 455 U.S. 586, 588 n.4 (1982). Even in a capital case, procedural default justifies a federal habeas court's refusal to address the merits of the defaulted claims. Smith v. Murray, 477 U.S. 527 (1986).

B

Coleman asserts that the district court erred because the dismissal by the Virginia Supreme Court was based on a novel reading of an ambiguous procedural rule, namely whether an order is "entered" on the date the judge issues it or the date the clerk records it. He relies on the proposition that a procedural ground is inadequate if it fails to provide fair notice to the litigant. See, e.g., James v. Kentucky, 466 U.S. 341 (1984).

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for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.



The major premise of Coleman's argument is flawed. The rule is not ambiguous. Its application by the Supreme Court was not novel. Notice to Coleman was adequate. The final order of the state habeas court contains the following notation immediately above the judge's signature: "Entered this 4th day of September 1986." Virginia case law giving effect to the judge's notation of entry is clear. In Peyton v. Ellyson, 207 Va. 423, 430-31, 150 S.E.2d 104, 110 (1966), the Court held that the final order denying a petition for writ of habeas corpus was entered on the date the judge signed the order and that the time for appeal started running from that date.

C

Coleman next argues that the rule of procedural default is inapplicable because his late filing did not represent a deliberate bypass of the courts. He relies on Fay v. Noia, 372 U.S. 391 (1963), and its progeny, Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977).

Murray v. Carrier forecloses Coleman's reliance on Fay and Ferguson by holding that whether procedural default in appellate proceedings bars federal consideration of the defaulted claims should be determined by the cause and prejudice standards of Wainwright v. Sykes, and not by the deliberate bypass standard of Fay. 477 U.S. at 485-92. See also Smith v. Murray, 477 U.S. at 533. In Murray v. Carrier, the Court noted that it expressed no opinion concerning application of the deliberate bypass standard

to decision of counsel "not to take an appeal at all." 477 U.S. at 492. But this reservation need not detain us, because Coleman's counsel decided to take an appeal.

D

A prisoner can avoid the bar of procedural default if he can show "cause for the noncompliance" with state law and "actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. at 84. Coleman assigns as cause his counsel's error in failing to file a timely notice of appeal from the final order of the state habeas court. The error, he asserts, is of sufficient magnitude to constitute ineffective assistance of counsel that denied him access to the courts. He relies on Murray v. Carrier, 477 U.S. at 489, where the Court discussed the circumstances which would justify treating error of counsel as cause.

Coleman's reliance on Murray v. Carrier is misplaced. There the Court was discussing error arising out of a direct appeal in which a prisoner has a right to counsel whose performance is not constitutionally ineffective. In contrast, the error in Coleman's case occurred in state habeas corpus proceedings. The difference in the proceedings is significant, for a state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel. Murray v. Giarratano, 109 S. Ct. 2765 (1989).

Wainwright v. Torna rejects a claim that is essentially similar to Coleman's. In Torna, a prisoner's counsel filed an



application for discretionary review in the state Supreme Court one day late. The prisoner charged that this error denied him effective assistance of counsel. The Supreme Court held: "Since [the prisoner] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." 455 U.S. at 587-88. Because Coleman, like Torna, had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel. Thus, he cannot show "cause" by showing ineffective assistance of counsel. But see Madyun v. Young, 852 F.2d 1029, 1033 n.2 (7th Cir. 1988) (dictum).

E

A prisoner may also avoid the bar of procedural default by demonstrating that denial of federal review will result in a fundamental miscarriage of justice. Harris v. Reed, 109 S. Ct. at 1043; Smith v. Murray, 477 U.S. at 537; Murray v. Carrier, 477 U.S. at 495. This avenue of relief, however, is limited to "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 496. This principle does not entitle Coleman to avoid the bar of his procedural default.

The district court found that the evidence was sufficient to show Coleman's guilt beyond a reasonable doubt. The evidence included Coleman's admission that he participated in the crimes. Hair, blood, and semen typing indicated that Coleman raped the

victim. See Coleman v. Commonwealth, 226 Va. at 52-53, 307 S.E.2d at 876. Proof of Coleman's conviction for the attempted rape of another person several years earlier and the manner in which he killed his victim in this case were aggravating factors that the jury could consider in imposing the death sentence. See 226 Va. at 53-55, 307 S.E.2d at 876-77.

In sum, we conclude that the district court did not err by ruling that the failure by Coleman's counsel to file a timely notice of appeal from the final order of the state habeas court constituted a procedural default barring federal review of the claims asserted only in the state habeas corpus proceeding.

II

The second issue raised by Coleman is as follows:

> Did the District Court err in dismissing Coleman's petition without first holding an evidentiary hearing even though material factual disputes raised in collateral review proceedings before the Commonwealth courts had not been resolved?

Coleman asserts that the state court did not resolve factual disputes pertaining to his claim that one of the jurors, George Marrs, was biased against him. He also contends disputed issues of fact remain with respect to his claim of ineffective assistance of counsel.

Neither the complaint about the juror nor the claim of ineffective assistance of counsel was raised on direct appeal. Therefore, Coleman's procedural default in failing to file a timely notice of appeal of the state court's final judgment denying his



petition for a writ of habeas corpus bars his review in federal court. Consequently, an evidentiary hearing was unnecessary.

III

The district court held that Coleman's next three issues were also barred by procedural default. Nevertheless, it alternatively considered Coleman's claims and found them to be without merit. In addition to his general denial of procedural default, Coleman assigns error to the district court's alternative disposition of his claims for lack of merit. He raises the following issues:

> Did the District Court err in finding that Coleman was not convicted by a biased jury even though evidence presented in the collateral review proceedings in the Commonwealth courts demonstrated that one of the jurors had, before trial, expressed his desire to be on the jury so he could help "burn" Coleman?
>
> Did the District Court err in finding that Coleman was effectively represented by counsel when the evidence demonstrates that the representation Coleman received, from the change of venue motion, through trial preparation and the sentencing proceeding, was grossly deficient and prejudiced Coleman?
>
> Did the District Court err in finding that the Commonwealth satisfied due process discovery requirements even though it failed to produce to Coleman evidence which supported Coleman's alibi and undermined the prosecution's theory of the case?

None of the claims mentioned in these issues was raised on direct appeal. The state habeas court found that they lacked merit, and the Virginia Supreme Court denied discretionary review because Coleman's notice of appeal was untimely.

The district court properly sustained the state's position that Coleman's procedural default barred federal review of all of these claims.

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IV

Coleman asserts that the death penalty was unconstitutionally imposed for reasons that he states in the final issue that he raises on appeal:

> Did the District Court err in finding that the death penalty was constitutionally imposed on Coleman in spite of the fact that (a) the record cannot support the conclusion that the jury met the requirements of Virginia law by unanimously finding the existence of an aggravating circumstance, and (b) the jury was not provided with a constitutionally adequate limiting construction for Virginia's "outrageously or wantonly vile" aggravating circumstance?

Coleman made no objection in the trial court or on direct appeal to the errors he now assigns. As we have previously noted, Coleman did not perfect a timely appeal from the denial of his state habeas corpus petition. The state asserts, and the district court properly ruled, that federal review of Coleman's complaints about the constitutionality of the death sentence is barred by his procedural default at both the trial and habeas proceedings.

V

Quite apart from the propriety of the instructions in the penalty phase of the trial, the decision of the Virginia Supreme Court establishes that Coleman's sentence was lawful. Neither the Sixth nor Eighth Amendment requires "a jury trial on the sentencing



issue of life or death." Hildwin v. Florida, 109 S. Ct. 2055, 2056 (1989) (Sixth Amendment); Cabana v. Bullock, 474 U.S. 376, 384-88 (1986) (Eighth Amendment). State law may authorize a forum other than the jury to impose the death penalty. An appellate court is a constitutionally permissible forum. Cabana, 474 U.S. at 392.

Cabana dealt with an aggravating factor necessary for the imposition of the death penalty on one who aids and abets a felony in the course of which others commit a murder. See Cabana, 474 U.S. at 378. The Court held that, if authorized by state law, an appellate court can determine whether an aggravating factor has been proved and can impose the death penalty. The appellate court can exercise such power even when the jury may not have found an aggravating factor. 474 U.S. at 384-88. Under these circumstances a federal court should not confine its inquiry to the jury instructions. "Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made." 474 U.S. at 387. A federal court errs by "focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of [the aggravating factor] had been made by the trial court or by the state appellate court." 474 U.S. at 389. Although Cabana dealt with a specific categorical aggravating factor, the principles the Court explained are applicable to the determination of other aggravating factors in crimes committed under circumstances quite different from those

examined in Cabana. See, e.g., Johnson v. Mississippi, 108 S. Ct. 1981, 1989 (1988) (White, J., concurring). The major premise of Cabana--the Constitution does not require a jury for the imposition of the death penalty--is applicable to Coleman's case.

To apply Cabana's principles, a federal court must determine what authority state law confers on its appellate court with respect to the death penalty and then ascertain whether this authority has been constitutionally exercised. Cf. Spazino v. Florida, 468 U.S. 447, 457-65 (1984).

Virginia law confers broad powers on the Supreme Court. Va. Code Ann. § 17-110.1 (1988). Every sentence of death must be reviewed by the Court. This review may be consolidated with an appeal, if one is taken. In addition to errors "enumerated by appeal," the Court must consider other specific issues that address the fundamental fairness of the trial and sentence.[2] The statute vests in the Supreme Court extraordinary authority to commute the sentence of death to imprisonment for life. It may affirm the sentence of death or remand for new sentencing proceedings. In short, the only limitation on the Court's power is the authority to impose a death sentence when the trial court, with or without a jury, has imposed a lesser penalty.

In Coleman's case, the Virginia Supreme Court exercised the power conferred on it by § 17-110.1. It compared Coleman's case

[2]There is no counterpart to this proceeding in the federal judicial system. Federal review of constitutional issues in death cases, unfettered by procedural bars, would promote fairness and reduce the delay and complexity that all too often mark the present system.



to others "where the death sentence was based upon the dangerousness of the defendant and the vileness of the crime."[3] Coleman v. Commonwealth, 226 Va. at 54, 307 S.E.2d at 877. Justifying the application of these statutory aggravating factors, it recounted that "Coleman, who had previously been convicted of attempted rape, raped his victim, cut her throat, dragged her through her house, and stabbed her twice at or after her death." 226 Va. at 55, 307 S.E.2d at 877. The Court cited as a somewhat analogous case Smith v. Commonwealth, in which it constitutionally limited the statutory vileness factor by defining "'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). The Court stated that it had "independently determined that the sentence of death was properly imposed," and it "decline[d] to commute the sentence." 226 Va. at 55, 307 S.E.2d at 877.

[3]Va. Code Ann. § 19.2-264.4C (1983) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

We have upheld the constitutionality of the statute as narrowed by Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). See Turner v. Bass, 753 F.2d 342, 353 (1985).

In Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988), the Court explained:

> Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

The Virginia Supreme Court's review of the sentence satisfies this constitutional requirement.

Finding no constitutional infirmity that is cognizable on federal review, we affirm the judgment of the district court denying a writ of habeas corpus.





UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-4002

ROGER K. COLEMAN

Petitioner - Appellant

v.

CHARLES THOMPSON, Warden

Respondent - Appellee

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On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Chapman and Judge Merhige.

For the Court,

JOHN M. GREACEN

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

ROGER KEITH COLEMAN, :
Plaintiff :
v. :
CHARLES E. THOMPSON, Warden, :
Defendants :

CIVIL ACTION NUMBER 88-0125-A

O R D E R

In accordance with a Memorandum Opinion entered this date, the petition for habeas corpus is denied in its entirety.

Nothing further remaining to be done, this case is dismissed and stricken from the docket.

The Clerk is directed to send certified copies to counsel of record.

ENTER: This 6th day of December 1988.

Glen M. Williams
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: Deputy Clerk





IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

ROGER KEITH COLEMAN, :
Plaintiff :
v. :
CHARLES E. THOMPSON, Warden, :
Defendants :

CIVIL ACTION NUMBER 88-0125-A

MEMORANDUM OPINION

Roger Keith Coleman ("Coleman") was convicted of the rape and capital murder of Wanda McCoy in Buchanan County, Virginia. For the rape conviction, punishment was fixed at life imprisonment and on a separate hearing on the issue of punishment for the capital murder conviction, a sentence of death was imposed. The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983). A writ of certiorari was denied by the United States Supreme Court. 46 U.S. 1109 (1984). On April 26, 1984, Coleman filed a petition for a writ of habeas corpus in the Buchanan County Circuit Court. An evidentiary hearing was conducted and a letter opinion dated June 23, 1986 rejected Coleman's claims. The Order in accordance with the letter opinion was signed on September 4, 1986. Coleman filed a notice of appeal on October 7, 1986 and subsequent thereto, filed a motion to correct the date of entry of judgment in the Circuit Court. Coleman requested in the motion that the Circuit Court correct the date of final judgment from September 4, 1986 to September 9, 1986. This motion was denied and on December 3, 1986 Coleman filed a petition for appeal in the Virginia Supreme Court.

A motion to dismiss the appeal was filed on the grounds that the notice of appeal had not been filed in a timely manner. The Virginia Supreme Court granted the motion to dismiss by Order dated May 19, 1987 and subsequently denied a petition for a rehearing on June 12, 1987. On September 10, 1987, Coleman filed a petition for a writ of certiorari in the United States Supreme Court, which petition was denied on October 19, 1987. Coleman v. Bass, 108 S.Ct. 269 (1987).

Coleman now files this complaint challenging the validity of his convictions and death sentence, raising the following claims:

A. AT LEAST ONE MEMBER OF THE JURY, GEORGE MARRS, FAILED TO DISCLOSE HIS PRECONCEIVED OPINION OF COLEMAN'S GUILT.

B. COLEMAN WAS NOT AFFORDED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

C. COMMUNITY PREJUDICE SO INFECTED THE TRIAL AS TO DEPRIVE COLEMAN OF AN IMPARTIAL JURY AND DUE PROCESS OF LAW.

D. JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

E. THE PROSECUTION FAILED TO DISCLOSE EXCULPATORY EVIDENCE.

F. THE PROSECUTION"S CLOSING ARGUMENT DENIED COLEMAN A FAIR TRIAL.

G. THE JURY INSTRUCTIONS AT THE PENALTY STAGE WERE CONSTITUTIONALLY INADEQUATE.

H. THE ADMISSION OF PHOTOGRAPHS DENIED COLEMAN A FAIR TRIAL.

I. EVIDENCE OBTAINED IN VIOLATION OF MIRANDA WAS IMPROPERLY ADMITTED.

J. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.



K. VIRGINIA'S CAPITAL MURDER STATUTE AND SENTENCING PROCEDURES ARE UNCONSTITUTIONAL FACIALLY AND AS APPLIED, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Claims C, H, I, and J were raised by Coleman in his direct appeal from his conviction to the Supreme Court of Virginia. Claims A, B, D, E, F, G, and K were raised by Coleman in the state habeas petition and therefore, the petitioner has exhausted state remedies on all of the issues raised in this case. Defendant has filed a motion to dismiss all of Coleman's claims. The matter has been thoroughly briefed and has been orally argued and is now ripe for decision.

The defendant contends that claims A, B, D, E, F, G and K which were not raised on direct appeal, but were subsequently raised in the state habeas proceedings are barred from federal review because Coleman failed to perfect an appeal to the Supreme Court of Virginia. Rule 5:9 (a), Rules of the Supreme Court of Virginia, provides that a notice of appeal must be filed with the clerk of the trial court within thirty days after entry of final judgment. The time limit cannot be extended. Rule 5:5 (a). The Order dismissing the habeas petition was signed by the Circuit Court Judge on September 4, 1986 and so states on its face. Actually, the evidence shows that Coleman's counsel had known since June 23, 1986 the decision of the Circuit Court Judge in the letter mailed to the parties. Coleman did not file his notice of appeal until thirty-three days after entry of judgment. Coleman sought the court to change the date of the state court Order on the theory that the entry of judgment did not occur until the

Clerk of Buchanan County Circuit Court had actually filed the same.

The Supreme Court of Virginia has held that Rule 5:9 (a) is mandatory. Vaughan v. Vaughan, 215 Va. 328, 210 S.E.2d 140 (1974). Coleman, having failed to follow the required state procedural rule, has procedurally defaulted. Wainwright v. Sykes, 433 U.S. 72 (1977). Sykes applies to capital and non-capital cases. Smith v. Murray, 477 U.S. 527, 538 (1986). It is argued, however, that the blame for the procedural fault rested upon the habeas attorneys and that the petitioner has just cause not to be bound by the procedural error. The right to effective assistance of counsel is not required as a constitutional right in state habeas proceedings, Evitts v. Lucy, 469 U.S. 387 (1985). Since there is no constitutional right to counsel during state habeas proceedings, there is no constitutional right to effective assistance of counsel at that stage. Whitley v. Muncey, 823 F.2d 55 (4th Cir. 1987), cert. denied, 107 S.Ct. 3279 (1987). A state court dismissal of appeal because a notice is filed one day late does not deny due process. Wainwright v. Torna, 455 U.S. 586 (1982). This court accordingly finds that Coleman defaulted by failing to perfect his habeas appeal in the Virginia Supreme Court in a timely manner. However, in view of the gravity of this case, the court will proceed to analyze the various claims made by Coleman.

Coleman also contends that the state court, upon hearing his habeas proceeding, failed to make credibility findings on matters which were in dispute and also desires an additional evidentiary hearing to present additional evidence which was not presented in the state court. The court has reviewed the record in the state court proceedings and finds that the state Circuit Court Judge, hearing the case, did make specific evidentiary findings of credibility and to allow Coleman to present again this same matter before this court is to have this court to consider whether it would make the same credibility finding that was made by the state court. Coleman was represented by counsel, was given a fair opportunity to present any evidence that he wanted to and the court proceeded to rule on all the matters that were presented to it. Therefore, the court is of the opinion that, since there was an adequate hearing given to Coleman on the state level, it is improper to conduct another hearing in this court.



**A. WAS JUROR MARRS PREJUDICED AGAINST THE DEFENDANT IN SUCH A WAY THAT HE SHOULD NOT HAVE BEEN A JUROR AND DID HE FAIL TO DISCLOSE THIS FACT ON VOIR DIRE?**

At the state evidentiary hearing, Coleman presented the evidence of Texas and Opal Rash who were first cousins of a juror by the name of George Marrs. These two witnesses testified that some time prior to Coleman's trial, Marrs had expressed to them a desire to serve on Coleman's case and also expressed an opinion that Coleman was guilty. They also presented evidence that Marrs stated that he "wanted to help burn the s.o.b." George Marrs appeared and testified as a witness and categorically denied any such conversation with the Rashes and denied that he made any statements attributed to him and denied that he was prejudiced in any way at Coleman's trial.

In a letter opinion dated June 23, 1986, the state habeas court recited the Rashes' testimony and found that the

issue was one of credibility. The court then concluded that "the testimony of George Marrs was not biased and was credible." This court must presume that this finding that Marrs' testimony was credible is correct. 28 U.S.C. § 2254(d), Summer v. Mata, 455 U.S. 591, 592 (1982); Marshall v. Lonberger, 459 U.S. 422 (1983); Patton v. Yount, 467 U.S. 1025, 1036 (1984).

In conjunction with the claim that Marrs was an improper juror, Coleman also contends that he was denied the opportunity to question Marrs concerning whether or not he knew that Coleman had been convicted of a prior felony, of attempted rape, and that such knowledge was a significant factor in the jury's deliberations at the guilt stage of the trial. Nowhere in the petition for a writ of habeas corpus did Coleman allege that the jury had been improperly influenced during deliberations by knowledge of Coleman's prior record. There is nothing in the state court's decision whereby it purported to decide such a claim. Since Coleman did not raise this claim in his state petition he cannot raise it now. Whitley v. Bair, 802 F.2d 1487, 1500 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987). Even if procedural default were not involved, the evidence Coleman sought to have admitted is inadmissible. The Federal Rules of Evidence provide that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith . . ." Fed. R. Ev. § 606(b). It would contravene this rule to allow Marrs to testify



to his and other jurors' states of mind during their deliberations.

**B. INEFFECTIVE ASSISTANCE OF COUNSEL**

Coleman advances several instances which he alleges constitute ineffective assistance of counsel. Coleman must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984).

Coleman's first allegation of ineffective assistance of counsel is that "[c]ounsel failed to provide effective assistance with respect to Coleman's motion for a change of venue based on prejudicial publicity and community prejudice . . . ." The record shows that his attorney did present five newspaper articles and the testimony of Coleman's father and also attempted to enlist the assistance of other members of Coleman's family. Therefore, there was evidence presented on behalf of Coleman in order to obtain a change of venue. Trial counsel, however, was of the opinion, based upon his experience in the county, that he could get a fair trial in Buchanan County and that under existing law, it would be necessary for them to show that he could not get a fair trial during the jury selection process. Therefore, counsel conducted an extensive voir dire which consumes more than two hundred and fifty pages of the transcript. While, in hindsight, it may appear that counsel could have done more on the change of venue, this court is of the opinion that the attorney did an excellent job of pursuing this matter and cannot be second-guessed.

Coleman contends that his counsel conducted a constitutionally ineffective voir dire concerning juror attitudes toward the death penalty and exposure to pretrial publicity. During voir dire eight jurors were excluded for cause, without objection, because they indicated they could not impose the death penalty. Coleman's counsel did not attempt to rehabilitate these witnesses. The court does not find that counsel's failure to rehabilitate constitutes ineffective assistance. Counsel knew the jurors were excludable for cause. Lockhart v. McKee, _____ U.S. ___, 106 S.Ct. 1758 (1986); Wainwright v. Witt, 469 U.S. 412 (1985). With respect to voir dire concerning exposure to pretrial publicity, the court has already noted counsel's "extensive and searching voir dire." The court concludes that Coleman was adequately assisted by counsel during jury voir dire.

Coleman also contends that during the guilt stage, preparation was inadequate. However, this court agrees with the state Circuit Judge who tried the habeas case that trial counsel did adequately investigate, prepare for and present the case at the guilt stage and that they had an excellent understanding and knowledge of the facts of the case. This court agrees with the findings of the state habeas court that counsel's cross-examinations of the prosecution's witnesses showed an excellent understanding and knowledge of the facts of the case. An expert attorney called by the plaintiff at the habeas hearing found that the cross-examination was "a good job." Coleman claims that he was prejudiced because his counsel did not personally interview Roger Matney and also contends that they failed to interview certain prosecution witnesses. Coleman did not produce any evidence



at the state habeas hearing and he has not proffered any to this point as to any witnesses that were not interviewed and the court is of the opinion that the failure to interview personally Roger Matney is speculative as to any possible prejudice.

Coleman contends that his attorneys failed to file appropriate motions. More specifically, he contends that counsel should have filed a discovery motion requesting Phillip Van Dyke's time card. The crime for which Coleman was convicted occurred at 11:00 p.m. Coleman spoke with Van Dyke from 10:25 to 10:30 p.m. on the evening in question. When Van Dyke left Coleman, he proceeded directly to work and "punched in" at 10:41 p.m. This conversation with Van Dyke constituted a link in the chain of Coleman's alibi defense. Van Dyke's time card was not introduced at trial; however, Van Dyke testified that he punched in at 10:41 p.m. and his testimony was not disputed. The court fails to see how this constitutes deficient performance on the part of defense counsel. Although the time card was not introduced there certainly was evidence introduced as to the time of the Coleman-Van Dyke conversation.

Coleman also contends that his counsel were ineffective because they failed to object to the argument presented by the prosecution. The court has reviewed the arguments submitted by the prosecution and is of the opinion that any failure to object was simply a matter of strategy on the part of counsel. Attorneys are generally reluctant to object to argument where the objection will merely highlight the objectionable information. This trial tactic does not constitute ineffective assistance of counsel.

Coleman also contends that there was inadequate preparation and presentation of evidence at the penalty stage of his trial. Upon a review of the record, the court is of the opinion that counsel properly prepared Coleman for the penalty proceeding and requested Coleman to give them the names of witnesses but Coleman did not provide any. It was the testimony of trial counsel that Coleman told them that he didn't want any witnesses and didn't want anybody at the penalty stage of the hearing. Counsel received no help from the friends and relatives of Coleman. Such witnesses as were called were witnesses that were found and deemed to be relevant by counsel and not as a result of any help that they received from Coleman or his family. Coleman also contends that improper instructions were given at the penalty stage of the hearing. The court has examined these instructions and finds that they are grounded in Virginia law. Certainly counsel cannot be deemed ineffective for failing to object when the instructions accurately state Virginia law.

Coleman also contends that he was given ineffective assistance of counsel on direct appeal. However, Coleman's attorneys raised a total of seven issues before the Virginia Supreme Court, all of which had been properly preserved for appeal and all of which were decided by the Virginia Supreme Court. The court is of the opinion that counsel proceeded properly.

**C. DID THE STATE TRIAL COURT IMPROPERLY DENY COLEMAN'S MOTION FOR CHANGE OF VENUE?**

Coleman contends that the state trial court improperly denied his motion for change of venue or venire. The Virginia



Supreme Court specifically found that the trial court "had no difficulty in impaneling a jury free from bias." Coleman v. Commonwealth, 226 Va. 31, 45, 307 S.E.2d 864-872 (1983). Under 28 U.S.C. § 2254(d) this court must afford a presumption of correctness to the state court finding that the jurors were fair and impartial. Wainwright v. Witt, 469 U.S. 412 (1985); Summer v. Mata, 449 U.S. 539 (1981). The record indicates that the trial court was extremely careful to assure that a fair and impartial jury was impaneled. Coleman conducted extensive individual voir dire. No juror was seated over Coleman's objection. The court concludes that the jury was fair and impartial and the trial court did not err in denying Coleman's motion for a change of venue or venire.

**D. EXCLUSION OF JURORS WHO OPPOSED DEATH PENALTY**

At the trial, eight jurors were excluded for cause because they opposed the death penalty. Coleman now contends that this was prejudicial error. Coleman did not raise this issue at trial or on appeal. The state habeas court determined that Coleman was barred by Virginia law from raising the claim in his state habeas petition. Slayton v. Perrigan, 215 Va. 27, 205 S.E.2d 680 (1974). The United States Supreme Court has held that "absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver " federal habeas review is barred. Wainwright v. Sykes, 433 U.S. 72, 87 (1976). Coleman has alleged no cause for his failure to raise this claim. This court, therefore, is barred from reviewing it.

**E. DID THE COURT COMMIT DISCOVERY VIOLATIONS BY FAILURE TO OBTAIN EXCULPATORY EVIDENCE ON BEHALF OF COLEMAN?**

Coleman alleges that the Commonwealth denied his due process rights by failing to provide Coleman with several items of exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1962). The Brady case "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 675 (1984). The Bagley case defined materiality as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

Id. at 682.

Coleman alleges the prosecution failed to disclose four items of exculpatory evidence: notes police took when interviewing Coleman's wife, Van Dyke's "time card," the crime scene report and Sandra Stiltner's statement. The court concludes these items of evidence were disclosed to Coleman. These items of evidence were in the prosecution's file. At the state habeas hearing Coleman's trial attorneys testified that they had full access to the prosecution's entire file. Therefore, the court concludes the prosecution did comply with Brady v. Maryland.

Even if the prosecution had not disclosed the material evidence, there was no due process violation. Coleman alleges that his wife told police he had arrived at home at 11:05 p.m. She had, however, also told both police and defense counsel that Coleman had arrived at home at 11:30 p.m. There is no reasonable



probability that police notes that indicated she once put 11:05 p.m. as the time of Coleman's arrival at home would have changed the outcome of the trial. As to the Van Dyke "time card," Van Dyke testified as to all of the relevant information on his time card. Disclosure of the time card would not have changed the outcome of the trial nor is it probable that the crime scene report would have changed the trial. It indicates that there was a mark made with very little pressure on the door to the victim's home. It is not probable that this would have affected the outcome of the trial given the fact that the victim's husband and the police chief testified that there was no sign of forced entry into the house. Finally, Coleman alleges that a statement made by Sandra Stiltner indicated Coleman came by her trailer between 10:00 and 10:30 on the night in question. At trial Ms. Stiltner testified Coleman could have left as late as 10:25 p.m. There is no reasonable probability, therefore, that the disclosure of Ms. Stiltner's statement would have affected the outcome of the trial.

**F. IMPROPER PROSECUTORIAL ARGUMENT**

The state habeas court found that all of the claims regarding prosecutorial argument were procedurally defaulted because they had not been raised at trial nor on appeal citing Slayton v. Perrigan, 215 Va. 27, 205 S.E.2d 680 (1974). This court is of the opinion that this matter has been double-defaulted in that it was not raised at trial nor was it raised on appeal and it was further procedurally defaulted in the appeal of the habeas proceedings.

## G. CONSTITUTIONAL ADEQUACY OF THE PENALTY STAGE INSTRUCTIONS

The state habeas court ruled that the claim was barred from habeas by Coleman's procedural default. The court is of the opinion that this is correct and the claim was again defaulted when Coleman failed to perfect an appeal of the habeas proceeding. This court has further reviewed the instructions however in the light of James Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984) and the court finds that the penalty stage instructions at Coleman's trial satisfy the Briley standard.

## H. SHOULD PHOTOGRAPHS OF THE VICTIM'S BODY FOUND AT THE SCENE OF THE CRIME HAVE BEEN ADMITTED INTO EVIDENCE?

Federal courts do not sit to review state evidentiary questions. Lisenba v. California, 314 U.S. 219 (1941). Unless there is something fundamentally unfair so as to make a constitutional issue of the same, generally this court is bound by the evidentiary findings of the state court. There is no contention that the photographs do not accurately depict what they purport to depict and such matters are and should be left to the discretion of the trial judge. The Virginia Supreme Court has found that the photographs were relevant and material under the facts of the case and this court is certainly required to give due deference to this finding by the state Supreme Court.

## I. DID THE STATE COURT CORRECTLY REJECT COLEMAN'S MIRANDA CLAIM?

Coleman's argues that the trial court admitted two statements the police obtained from him in violation of Miranda.



The state habeas court found the interrogatories to be noncustodial. This finding is entitled to a presumption of correctness. The interview of Coleman took place in a police officer's vehicle parked outside Coleman's house. At the trial, the officer testified that Coleman was free to leave. Coleman was not arrested until a month after this interview. Thus this court must concur with the state habeas court that there was no custodial interrogation.

## J. WAS THE EVIDENCE SUFFICIENT TO SHOW COLEMAN'S GUILT BEYOND A REASONABLE DOUBT?

Coleman argues that the evidence was insufficient to support the jury's verdict. In determining this issue, this court must view the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318 (1979). The Virginia Supreme Court in reviewing this issue followed a stricter standard. The Virginia court followed the rule that circumstantial evidence must be "sufficiently convincing to exclude any reasonable hypothesis except that of guilt." Coleman v. Commonwealth, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983). If the evidence is sufficient to meet the Virginia standard, then a fortiori it is sufficient to meet the lesser Jackson standard. Inge v. Procunier, 758 F.2d 1010, 1014 (4th Cir. 1985), cert. denied, 106 S.Ct. 104 (1985). The court finds that there was sufficient evidence to support the jury's verdict. There is a wealth of circumstantial evidence in this case in addition to evidence that Coleman admitted to Roger

Matney that he had participated in the rape-murder. Clearly, there was sufficient evidence in this case to go to the jury and there is sufficient evidence under the Jackson standard to sustain this conviction.

**K. CONSTITUTIONALITY OF VIRGINIA'S DEATH PENALTY STATUTE**

The state habeas court held that Coleman had procedurally defaulted with respect to his claim that Virginia's death penalty statute is unconstitutional because he failed to raise the claim at trial or on dire court appeal. See, Slayton v. Perrigan, 215 Va. 27, 205 S.E.2d 680 (1974). As noted earlier, in the absence of both cause and prejudice, federal habeas review is barred where there is a state procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977); Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988). Coleman has alleged neither cause for his default nor prejudiced from his default; therefore, it is not appropriate for this court to review this particular claim.

**CONCLUSION**

The court having found on the merits that there was no denial of any constitutional rights of Coleman in his trial and the various appeals and other hearings related thereto, the court is of the opinion that this petition for habeas corpus shall be denied in its entirety and an Order will entered to that effect.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 4 day of December 1988.

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: [illegible] Deputy Clerk

Albert M. Williams
UNITED STATES DISTRICT JUDGE



# VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 13th day of May, 1987.

Roger Keith Coleman, Appellant,

against Record No. 861147
Circuit Court No. 119-84

Gary L. Bass, Warden, etc., Appellee.

From the Circuit Court of Buchanan County

On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 1, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: Debra A. Kinsman
Deputy Clerk

No. 89-7662

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

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## QUESTIONS PRESENTED

I. Is petitioner's claim pertaining to the penalty-stage verdict barred by his multi-leveled procedural default?

II. Has petitioner demonstrated any reason warranting review of his attenuated Harris v. Reed claim?

III. In view of the lower courts' alternate rejection of the merits of his claims, has petitioner demonstrated any reason warranting review of his Sykes "cause" claim?



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No. 89-7662

IN THE
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ROGER KEITH COLEMAN,

Petitioner,

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Respondent.

On Petition For A Writ Of Certiorari To The
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---

RESPONDENT'S BRIEF IN OPPOSITION

---

## JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition for Writ of Certiorari at 2, in the appendix to the Petition at a1-a6, and in the appendix to this brief at App. 1.

## STATEMENT OF THE CASE

On March 18, 1982, a jury in the Circuit Court of Buchanan County, Virginia, convicted the petitioner, Roger Keith Coleman, of the rape and capital murder of his

sister-in-law, Wanda McCoy. For the rape conviction, the jury fixed Coleman's punishment at life imprisonment. The next day, after a separate hearing on the issue of punishment for the capital murder conviction, the jury fixed a sentence of death. On April 23, 1982, the Circuit Court imposed the death penalty in accordance with the jury's verdict.

The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia on September 9, 1983. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983). This Court denied a petition for a writ of certiorari on March 19, 1984. 465 U.S. 1109 (1984).

Coleman filed a petition for a writ of habeas corpus in Buchanan County Circuit Court on April 26, 1984. On November 12-13, 1985, an evidentiary hearing was conducted in the Circuit Court. In a letter opinion dated June 23, 1986, the Circuit Court rejected Coleman's claims, and in an order signed on September 4, 1986, final judgment was entered. Coleman filed his notice of appeal in the Circuit Court on October 7, 1986.

On October 25, 1986, petitioner filed a "Motion to Correct the Date of Entry of Judgment." That motion requested the Circuit Court to "correct" the date of final judgment from September 4, 1986 to September 9, 1986. In an order dated November 10, 1986, the Circuit Court denied the motion, stating that "final judgment in this case was entered on September 4, 1986 and...the records of this Court correctly reflect that fact at the present time."

On December 3, 1986, Coleman filed a petition for appeal in the Virginia Supreme Court. On December 9, 1986, the respondent filed a motion to dismiss Coleman's appeal because the notice of appeal was untimely. By an order dated May 19, 1987, the Virginia Supreme Court granted the respondent's motion and dismissed Coleman's petition for appeal. On June 2, 1987, Coleman filed a petition for rehearing which was denied on June 12, 1987.



Coleman filed a petition for a writ of certiorari in this Court on September 10, 1987. The petition was denied on October 19, 1987. Coleman v. Bass, 108 S.Ct. 269 (1987).

Coleman then filed a habeas petition in the United States District Court for the Western District of Virginia on April 22, 1988. On September 19, 1988, after extensive briefing, the district court heard oral argument on the Commonwealth's motion to dismiss and Coleman's motion for an evidentiary hearing. In a sixteen-page opinion dated December 6, 1988, the district court concluded that most of Coleman's claims were procedurally barred by his default during the state habeas proceedings. Nevertheless, in an abundance of caution, the district court reviewed those claims, as well as the others which Coleman had raised in his petition, and concluded that Coleman was not entitled to federal habeas relief. (a25-a40).

Coleman appealed to the United States Court of Appeals for the Fourth Circuit. On January 31, 1990, the Fourth Circuit affirmed the denial of habeas relief. Coleman v. Thompson, 895 F.2d 139 (4th Cir. 1990). (a7-a22). A petition for rehearing was denied on February 27, 1990 (a23), and the Fourth Circuit's mandate issued on March 23, 1990.

## STATEMENT OF FACTS[1]

Coleman was convicted and sentenced to death for the 1981 rape-murder of his wife's sister. The cause of death was a "slash wound" to the throat which had severed the victim's right carotid artery, jugular vein, and larynx. There were two stab wounds to the victim's chest, one of which had penetrated the heart and lung but had been inflicted after the victim's death. The other had penetrated the victim's liver and was inflicted after death or close to the time of death.

The evidence against Coleman was largely circumstantial, including forensic evidence that Coleman had a rare blood type possessed by only ten percent of the population, that the sperm found in the victim's vagina emanated from someone with the same blood type as Coleman's, and that two hairs found on the victim's pubic area matched Coleman's pubic hair. The evidence also included testimony that Coleman admitted to a fellow jail inmate that he and another person had participated in the rape-murder.

At the penalty stage, the Commonwealth presented evidence that Coleman had committed an attempted rape in 1977 and had been sentenced to three years in the penitentiary for that offense. In recommending the death sentence, the jury found that

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[1] A more detailed statement of facts is found in the Supreme Court of Virginia's opinion on direct appeal. Coleman, 226 Va. at 34-44, 307 S.E.2d at 865-871. In petitioner's "Statement of the Case," he misrepresents several "facts" which, although not directly related to any of his "Questions Presented," are nevertheless rebutted by the record and the district court's opinion. For instance, he claims that two allegedly exculpatory investigative reports were improperly withheld by the prosecution. (Ptn. 3-4). In rejecting Coleman's discovery claims, however, the district court ruled that petitioner's trial attorneys had been given "full access to the prosecution's entire file." (a36). Likewise without support is Coleman's assertion that his trial attorneys never prepared for the penalty stage until after the guilt stage. (Ptn. 5). In rejecting Coleman's ineffective counsel claim, the district court expressly found that counsel had properly prepared for the sentencing stage and that Coleman had expressly told his attorneys that he did not want to present any mitigation evidence. (a34). Finally, petitioner claims that the state habeas judge never resolved Coleman's allegation that a certain juror had made statements prior to trial that he "wanted to be on the jury to help execute Coleman." (Ptn. 6). This assertion, however, is directly contradicted by the district court's express finding that the state habeas court resolved the juror credibility issue in favor of the Commonwealth. (a29-a30). See also 28 U.S.C. § 2254(d).



Coleman was "future dangerous" and that his offense was "outrageously or wantonly vile" in that it involved torture, depravity of mind, and aggravated battery to the victim. See Va. Code § 19.2-264.2.

## REASONS FOR DENYING THE WRIT

### I.

### COLEMAN'S DUE PROCESS CLAIM PERTAINING TO THE UNANIMITY OF THE PENALTY-STAGE VERDICT IS BARRED BY PROCEDURAL DEFAULT AND DOES NOT WARRANT CERTIORARI REVIEW.

Petitioner contends that he was denied due process when the penalty-stage instructions at his trial permitted the jury to return a verdict which, in Coleman's opinion, violated Virginia law because it allegedly did not specify that the jury was unanimous in finding at least one aggravating circumstance. This claim does not warrant certiorari review because it is clearly barred by procedural default, because it is constitutionally irrelevant, and because it is premised on a faulty concept of Virginia law.

**A. Procedural default**

Coleman concedes that he failed, both at trial and on direct appeal, to raise a due process challenge to the form of the jury's verdict. (Ptn. 18 n.7). Both the Fourth Circuit (a18) and the district court (a38) correctly ruled that, quite apart from Coleman's default during the state habeas proceedings, his earlier defaults at trial and on direct

appeal barred federal review of this claim.[2] See Wainwright v. Sykes, 433 U.S. 72 (1977).

Petitioner's perfunctory effort to establish Sykes "cause" by asserting ineffective assistance of counsel (Ptn. 18 n.7) must fail. In rejecting the identical assertion below, the district court stated:

> Coleman...contends that improper instructions were given at the penalty stage of the hearing. The court has examined these instructions and finds that they are grounded in Virginia law. Certainly counsel cannot be deemed ineffective for failing to object when the instructions accurately state Virginia law.

(a34). The Fourth Circuit expressly ratified the district court's finding of procedural default. (a18).

Thus, both courts below found that Coleman's claim is procedurally barred and that he failed to establish ineffective assistance of counsel as Sykes "cause" because the penalty-stage instructions and verdict form accurately reflected Virginia law.[3] Petitioner's unexcused default clearly constitutes an adequate and independent state ground which bars review by this Court.

**B. Constitutional irrelevance**

Petitioner's attack on the jury's verdict with regard to aggravating circumstances is constitutionally irrelevant. Under Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988), even if the only aggravating circumstance found at the penalty stage is later

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[2] While petitioner's second "Question Presented" (Ptn. 20) raises an issue under Harris v. Reed, __ U.S. __, 109 S.Ct. 1042 (1989), it pertains only to whether his default during state collateral proceedings can be enforced. It has no bearing on claims, such as this one, which Coleman defaulted at trial and on direct appeal. Indeed, in the Fourth Circuit, Coleman conceded that, unless he could show Sykes "cause" and "prejudice," his due process claim was barred. (See excerpt from Coleman's Fourth Circuit brief in the attached appendix at 2-3). He makes the same implicit concession in this Court. (Ptn. 18 n.7).

[3] Deference to the lower courts' view of Virginia law is appropriate because they "are better schooled in and more able to interpret the laws of their...States." See Frisby v. Schultz, __ U.S. __, 108 S.Ct. 2495, 2500 (1988).



invalidated, the death sentence will remain constitutionally valid where the required narrowing of the class of those eligible for the death penalty has been accomplished at the guilt stage. 108 S.Ct. at 555. In Virginia, the constitutionally required narrowing function is sufficiently accomplished at the guilt stage because a jury cannot convict a defendant of capital murder unless it finds beyond a reasonable doubt that the accused committed one of a class of narrowly defined capital offenses. See Va. Code § 18.2-31. (See appendix to this brief at 1).

In Coleman's case, the narrowing function was sufficiently accomplished when the jury found beyond a reasonable doubt that he committed a willful, deliberate and premeditated murder during the commission of rape. See Va. Code § 18.2-31(e). If a State can constitutionally premise a death sentence upon a finding at the penalty stage that the murder was committed during the commission of a rape, see, e.g., Gregg v. Georgia, 428 U.S. 153, 164 n.9 (1976), then by accomplishing an identical narrowing of the class of those eligible for the death penalty at the guilt stage, Virginia is not constitutionally required to accomplish any further narrowing of that class at the penalty stage. Thus, in the context of Virginia's scheme of capital punishment, Coleman's claim about whether the jury unanimously found either or both aggravating circumstances is constitutionally meaningless.

**C. Faulty premise**

The linchpin of Coleman's so-called "due process" claim is his assertion that the jury's sentencing verdict was defective under Virginia law. While he concedes (Ptn. 11 n.3) that the verdict was unanimous on the issue of punishment and was returned in the exact language of Virginia's statutory verdict form (Va. Code § 19.2-264.4D(i); a6), he nevertheless contends that the Virginia Supreme Court erroneously determined that the verdict satisfied the requirements of state law. (Ptn. 12). This argument must be rejected.

It is elementary that the Supreme Court of Virginia, not this Court, is the final arbiter of Virginia law. Virginia v. American Booksellers Ass'n., 484 U.S. 383, 395 (1988). Both before and after Coleman's case, the Virginia Supreme Court has consistently ruled that a penalty-stage verdict, returned in the exact wording of the statutory verdict form, is sufficient to satisfy the unanimity requirements of Virginia law. See Clark v. Commonwealth, 220 Va. 201, 213, 257 S.E.2d 784, 791-792 (1979), cert. denied, 444 U.S. 1049 (1980); Hoke v. Commonwealth, 237 Va. 303, 314-315, 377 S.E.2d 595, 602, cert. denied, 109 S.Ct. 3201 (1989). Indeed, in Hoke the Court expressly reaffirmed its prior decision in Coleman's case that a penalty-stage verdict satisfies Virginia law if it merely repeats the language set forth in Virginia Code § 19.2-264.4D. See Hoke, 237 Va. at 315, 377 S.E.2d at 602.

Petitioner's assertion (Ptn. 10) that this Court should grant certiorari to "clarify" this Court's recent treatment of Hicks v. Oklahoma, 447 U.S. 343 (1980), is meritless. In the wake of Cabana v. Bullock, 474 U.S. 376 (1986), and Clemons v. Mississippi, __ U.S. __, 110 S.Ct. 1441 (1990), Hicks needs no further clarification. Both cases make clear that, in order to establish a due process violation under Hicks, a petitioner must, at the very least, be correct in his assertion that he was denied something he was entitled to under state law. See Cabana, 474 U.S. at 387 n.4; Clemons, 110 S.Ct. at 1447-1448. In Coleman's case, the Virginia Supreme Court, as the final arbiter of Virginia law, has determined that the verdict in his case satisfied state law. See Coleman, 226 Va. at 53, 307 S.E.2d at 876. Here, as in Clemons, this Court has "no basis for disputing this interpretation of state law...." See 110 S.Ct. at 1447.

Moreover, the Fourth Circuit correctly recognized (a18-a22) that the Virginia Supreme Court, pursuant to Virginia Code § 17-110.1, reviewed Coleman's death sentence and "independently determined that the sentence of death was properly imposed." See Coleman, 226 Va. at 55, 307 S.E.2d at 877. The Supreme Court of Virginia has long exercised its authority to independently sustain a death sentence despite alleged error in



the jury's sentencing decision. See, e.g., Tuggle v. Commonwealth, 230 Va. 99, 110, 334 S.E.2d 838, 845-846 (1985), cert. denied, 478 U.S. 1010 (1986). Under Cabana and Clemons, Coleman had no constitutional right to have the sentencing determination made only by a jury, and his Hicks due process claim could not possibly succeed, even if it were not barred by procedural default.[4]

## II.

## COLEMAN'S HARRIS V. REED CLAIM DOES NOT WARRANT CERTIORARI REVIEW.

### A. Bound by prior concessions

Coleman contends that the Fourth Circuit erred when it ruled that the Virginia Supreme Court's order dismissing his state habeas appeal (a41) satisfied the requirements of Harris v. Reed, __ U.S. __, 109 S.Ct. 1038 (1989). He admits that the Commonwealth's motion to dismiss was predicated solely on default grounds, i.e., that his notice of appeal was untimely (Ptn. 7), and he admits that the Virginia Supreme Court granted the motion to dismiss. He asserts, however, that the Commonwealth's motion "might well have been granted because the court found the petition [for appeal] to be without substantive merit." (Ptn. 22-23). This assertion must be rejected, however, because it ignores the fact that Coleman has expressly conceded, in a prior proceeding in this Court, that his state habeas appeal was dismissed on procedural grounds and that the Virginia Supreme Court never reached the merits of this claims.

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[4] This Court has recently clarified the "new rule" principle which the Court had announced earlier in Teague v. Lane, __ U.S. __, 109 S.Ct. 1060 (1989). See Butler v. McKellar, __ U.S. __, 110 S.Ct. 1212 (1990). Under Teague, a "new" decision is generally inapplicable in cases on collateral review unless the decision was "dictated" by precedent at the time the prisoner's case became final. See Teague, 109 S.Ct. at 1070. In Butler, however, this Court stated for the first time: "The 'new rule' principle...validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." 110 S.Ct. at 1217. Under Teague and Butler, the rule petitioner seeks clearly would be a "new rule" and federal relief would have been unavailable even if Coleman had not defaulted his claim.

On September 10, 1987, Coleman filed in this Court a petition for a writ of certiorari to the Supreme Court of Virginia. See Coleman v. Thompson, No. 87-5448. At page three of that petition, Coleman stated:

> In refusing to consider the merits of Coleman's petition for appeal, the [Virginia Supreme Court] ignored established precedent and the explicit language of its own rule [requiring notice of appeal within 30 days after entry of judgment]....On this basis alone, the court summarily dismissed Coleman's petition for appeal....

(See excerpt from prior certiorari petition in the appendix to this brief at 4-5; emphasis added).

Of course, once this Court decided Harris v. Reed, Coleman immediately reversed his position, and on his return visit to this Court he now argues that the Virginia Supreme Court "might well have" dismissed his habeas appeal on the merits. This Court should not countenance such cynical "flip-flopping" by a petitioner who will obviously take whatever position he deems most expedient at any given time.

**B. No "special and important" reasons**

It is undisputed that, when Coleman filed his state habeas appeal, the Commonwealth responded by filing a motion to dismiss based solely on the fact that, as a matter of Virginia law, Coleman's notice of appeal was untimely. (a10). It is also undisputed that the Virginia Supreme Court granted the motion to dismiss and dismissed Coleman's petition.[5] (a10, a41). Under these circumstances, Coleman's Harris v. Reed claim clearly does not warrant certiorari review.

Neither the district court (a27-a28) nor the Fourth Circuit (a11-a12) had any difficulty concluding that the Virginia Supreme Court dismissed Coleman's habeas appeal solely because of his untimely notice of appeal. Indeed, no court could have reasonably

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[5] When the Supreme Court of Virginia denies relief on the merits, it "refuses" the petition for appeal, rather than "dismisses" it. See Saunders v. Reynolds, 214 Va. 697, 700-701, 204 S.E.2d 421, 424 (1974).



reached any other conclusion. An order which expressly grants a motion to dismiss, the sole basis of which was the untimely filing of a notice of appeal, clearly satisfies the "plain statement" rule set forth in Harris v. Reed.

Coleman's strained effort to establish an alleged "split" among the Courts of Appeals concerning the application of Harris v. Reed is inapposite. All of the cases relied upon by Coleman (Ptn. 24-31) involve the issue of whether a federal court can resolve an "ambiguous" order in favor of a finding of procedural default. In petitioner's case, neither of the courts below found the Virginia Supreme Court's order to be ambiguous. To the contrary, the Fourth Circuit stated:

> Coleman's argument lacks a factual basis. The Supreme Court complied with the "plain statement" rule that Harris made applicable to habeas corpus proceedings. The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal. The Court recites that it considered all of the papers filed by the parties. The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.

(a11, emphasis added).

Thus, even it were assumed for the sake of argument that a "split" exists among the circuits concerning how to deal with an ambiguous state-court order, such a "split" would be irrelevant to a proper disposition of Coleman's case, where no such ambiguity exists. When the Fourth Circuit has confronted a truly "ambiguous" state-court order, it has not hesitated to apply Harris v. Reed to reach the merits of a petitioner's federal claim, even where convinced that "the Virginia courts did intend to hold petitioner's claim procedurally barred...." See Evans v. Thompson, 881 F.2d 117, 123 n.2 (4th Cir. 1989).

Thus, petitioner's Harris v. Reed claim is nothing more than a mere assertion that the Fourth Circuit erred in applying Harris to the facts of his case. This Court, however, does not exercise its certiorari power merely to review perceived errors. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974). Coleman has failed to show any "special and

important" reason for granting such review.[6] See U.S.S.Ct.R. 10.1.

III.

**PETITIONER HAS SHOWN NO REASON WHY THIS COURT SHOULD REVIEW HIS CLAIM CONCERNING "CAUSE" FOR HIS DEFAULT DURING STATE HABEAS PROCEEDINGS.**

Coleman asserts that this Court should review the Fourth Circuit's conclusion (a14-a15) that, because he had no constitutional right to counsel during the state habeas proceedings, he could not assert "ineffective counsel" as "cause" for his procedural default during those proceedings. This argument should be rejected for a variety of reasons.

A. Underlying claims without merit

As previously mentioned, even though the district court enforced Coleman's procedural default, it also reviewed the merits of his claims and found no basis for federal habeas relief. (a29-a40). Likewise, the Fourth Circuit reviewed Coleman's claims and concluded that enforcing the default would not "result in a fundamental miscarriage of justice." (a15). The Fourth Circuit also satisfied itself that, despite Coleman's default, his constitutional challenge to his death sentence was meritless. (a18-a22).

Under these circumstances, this case would clearly be an inappropriate vehicle for reviewing the claim which Coleman is pressing. Even if the courts below had totally disregarded petitioner's state habeas default, there is no chance that he would have succeeded on the merits of his claims.

[6] Certiorari should also be denied in Coleman's case because, unlike any of the cases on which he relies, here the district court not only recognized and enforced the petitioner's procedural default, it also alternatively reached the merits of Coleman's claims and found them lacking. (a29-a40). And, as Coleman admits (Ptn. 9), despite his default, the Fourth Circuit reviewed, and found no merit in, his "capital sentencing claim." (a18-a22). Moreover, Coleman admits that his view of the proper application of Harris v. Reed necessarily "will entail an evaluation of state law" and a determination of what was "the last state court that must render a decision in order to exhaust state remedies." (Ptn. 31 n.14). Aside from the fact that Coleman never advanced such an argument in the Fourth Circuit, see Kentucky v. Stincer, 482 U.S. 730, 747 n.22 (1987), this Court should not grant certiorari to review such an attenuated claim.



B. Phantom "split"

Petitioner relies upon several cases from the Eighth Circuit, and one case from the Seventh Circuit, to support his assertion that this Court should grant certiorari to resolve an alleged "split" among the various Courts of Appeals. While he is correct in conceding that other circuits have reached the same conclusion reached by the Fourth Circuit (Ptn. 37, 42), a review of the Seventh and Eighth Circuit cases he cites reveals that Coleman's allegation of a "split" is fallacious.

While both Shook v. Clarke, 894 F.2d 1496, 1497 (8th Cir. 1990), and Shaddy v. Clarke, 890 F.2d 1016, 1018 n.4 (8th Cir. 1989), rely upon Harper v. Nix, 867 F.2d 455, 457 (8th Cir.), cert. denied, 109 S.Ct. 3194 (1989), for the proposition that a claim of ineffective habeas counsel can constitute "cause" for a procedural default, a review of Harper shows that the issue was neither raised nor decided in that case because it was undisputed that "[c]ounsel made a tactical decision to abandon" the defaulted claims. Harper, 867 F.2d at 457. Thus, neither Shook, Shaddy, nor Harper represents a definitive ruling by the Eighth Circuit that "cause" for a procedural default can be satisfied by an assertion of ineffective habeas counsel.

To the contrary, other panels of the Eighth Circuit have clearly indicated that, because there is no constitutional right to counsel during state habeas, a claim of ineffective habeas counsel cannot constitute "cause" for a procedural default. See Laws v. Armontrout, 834 F.2d 1401, 1415 n.10 (8th Cir. 1987), aff'd en banc, 863 F.2d 1377 (8th Cir. 1988), cert. denied, 109 S.Ct. 1944 (1989), citing Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984), and Williams v. Missouri, 640 F.2d 140, 143-144 (8th Cir.), cert. denied, 451 U.S. 990 (1981). Thus, the cases from the Eighth Circuit certainly do not support Coleman's contention that there is a "split" between that Circuit and the Fourth Circuit's decision in Coleman's case.

Likewise without foundation is Coleman's assertion that the Seventh Circuit's decision in Madyun v. Young, 852 F.2d 1029, 1033 n.3 (7th Cir. 1988), represents a "split" with the Fourth Circuit. As the Fourth Circuit recognized in Coleman's case (a15), the referenced footnote in Madyun is clearly dicta. And more importantly, when the Seventh Circuit was squarely presented with the issue, it held unequivocally that a claim of ineffective habeas counsel cannot constitute Sykes "cause." See Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990); Buelow v. Dickey, 847 F.2d 420, 425-427 (7th Cir. 1988), cert. denied, 109 S.Ct. 1168 (1989).

Certiorari should not be granted to resolve a "conflict" which does not exist. This Court should reject Coleman's attempt to manufacture a "split" where there is none.

**C. Carrier/Torna/Finley/Giarratano**

The Fourth Circuit correctly applied this Court's prior decisions and rejected Coleman's assertion of "ineffective habeas counsel" as "cause" for his procedural default. In Murray v. Carrier, 477 U.S. 478, 488 (1986), this Court held that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective...we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." (Emphasis added). And this Court has made clear that, unless one has a constitutional right to counsel, one cannot claim that his counsel was constitutionally ineffective. Pennsylvania v. Finley, 481 U.S. 551, 558 (1987) (the proposition that "the State may not cut off a right to appeal because of a lawyer's ineffectiveness...depends on a constitutional right to appointed counsel that does not exist in state habeas proceedings"); Wainwright v. Torna, 455 U.S. 586, 587-588 (1982). See also Evitts v. Lucey, 469 U.S. 387, 396 n.7 (1985) ("Of course, the right to effective assistance of counsel is dependent on the right to counsel itself.").

Clearly, Coleman did not have a constitutional right to counsel during his state habeas proceedings. See Murray v. Giarratano, __ U.S. __, 109 S.Ct. 2765, 2770 (1989); Pennsylvania v. Finley, 481 U.S. at 556. In no sense, was there any "external"



impediment to Coleman's timely perfecting of his state habeas appeal, particularly in view of the fact that Coleman's state habeas attorneys were retained counsel of his own choosing. See Torna, 455 U.S. at 588 n.4 (no due process violation where retained counsel filed discretionary appeal one day late). Thus, Coleman cannot establish Sykes "cause" by pointing to an alleged error by his habeas attorney. See Carrier, 477 U.S. at 488 ("cause" must be based on "some objective factor external to the defense").[7]

**CONCLUSION**

Coleman has clearly failed to present any "special and important" reasons which would warrant certiorari review. U.S.S.Ct.R. 10.1. His claims are either procedurally barred, constitutionally irrelevant, contrary to a position he has previously taken in this Court, or simply without merit. While the district court recognized Coleman's procedural default during the state habeas proceedings, that court nevertheless meticulously reviewed and rejected his claims. The Fourth Circuit also carefully reviewed the merits

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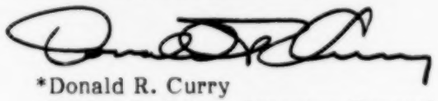
[7] According to petitioner, Fay v. Noia, 372 U.S. 391 (1963), rather than the Sykes "cause" and "prejudice" test, should govern his case. (Ptn. 46). This claim does not warrant certiorari review because it is so patently without merit. The Sykes standard is equally applicable whether the default occurred at trial, during direct appeal, or during state habeas proceedings. See Murray v. Carrier, 477 U.S. 478, 490 (1986). While the Carrier Court left undecided "whether counsel's decision not to take an appeal at all might require treatment under" Fay rather than Sykes, see Carrier, 477 U.S. at 492, the Court's reservation of that question only indicates that, if Fay has any continued vitality, it must be strictly confined to its facts. Fay, like most of the other cases Coleman relies upon (Ptn. 48), involved a default on direct appeal from a criminal conviction. See 372 U.S. at 394. While there is authority for the proposition that the decision whether to file the initial direct appeal is so fundamental that a defendant cannot be bound by his attorney's decision not to appeal, see Jones v. Barnes, 463 U.S. 745, 751 (1983), such a stringent default standard makes no sense where no fundamental right is involved. The fact that Coleman had no constitutional right to counsel for his state habeas appeal, see Finley, is a clear indication that no fundamental right was at stake in those civil proceedings. Therefore, even if Fay remains valid under the facts of that case, it has no application to Coleman's case where the default occurred, not on direct appeal, but during a state collateral appeal. See Buelow v. Dickey, 847 F.2d at 428-429; Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 907-908 (9th Cir. 1986). Nor does it have any application where, as here, counsel did not decide to forego an appeal, but rather, decided to appeal but failed to do so in a timely manner. Coleman has advanced no reason why this Court should retreat from the Sykes/Carrier line of cases, and return to the entirely unworkable "deliberate bypass" standard of Fay v. Noia.

of Coleman's constitutional challenge to his death sentence and satisfied itself that petitioner's case did not fall within the "fundamental miscarriage of justice" exception to the Sykes default rule. Petitioner has failed to present any reason to believe that, even if all of his multitudinous defaults were overlooked or excused, he would have any reasonable probability of succeeding on the merits of his claims. Under all these circumstances, this Court should deny Coleman's petition for certiorari review.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

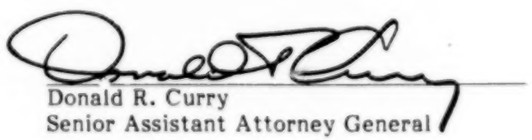


*Donald R. Curry
Senior Assistant Attorney General

*Counsel of Record

**CERTIFICATE**

I hereby certify that I, Donald R. Curry, Senior Assistant Attorney General of Virginia and a member of the Bar of this Court, did on or before this 20th day of June, 1990, mail with first class postage prepaid two copies of this brief in opposition to John H. Hall, Esquire, Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022, counsel of record for petitioner.



Donald R. Curry
Senior Assistant Attorney General



**APPENDIX TO**
**RESPONDENT'S BRIEF IN OPPOSITION**

**§ 18.2-31. Capital murder defined; punishment.** — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of any person in the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction; and

(h) The willful, deliberate and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction.

If any one or more subsections, sentences or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, c. 636; 1983, c. 175; 1985, c. 428; 1988, c. 550.)

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any restraint on the arbitrary and capricious infliction of the death sentence.

The Virginia Supreme Court has itself recognized the need for a limiting instruction for the depravity of mind subpart. In Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 976 (1979), the court construed "depravity of mind" to mean "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation," but neither the sentencing court nor the Virginia Supreme Court applied this limiting construction to Coleman's case. As in Godfrey, the fact that the state had used a limiting construction in prior cases does not cure the constitutional infirmity in Coleman's case. See Godfrey, 446 U.S. at 432. In the absence of sufficient limiting instructions on the "vileness" circumstance, the sentence of death was unconstitutionally imposed on Coleman because the jury's discretion was not channelled properly.

C. Because Coleman's Trial Counsel Was Ineffective For Failing To Object To The Capital Sentencing Instructions, This Court Can Hear Coleman's Claims.

Failure to object to the constitutionally infirm capital sentencing instructions constituted ineffective



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assistance of counsel. (App. 1065-69.) This ineffective assistance satisfies the cause and prejudice standard of Wainwright v. Sykes. See Murray v. Carrier, 477 U.S. 478 (1986). By failing to object to the capital sentencing instructions, Coleman's counsel allowed the Virginia capital sentencing scheme to be applied to Coleman in an unconstitutional way to his obvious prejudice. This failure to ensure that the Virginia capital sentencing scheme was applied properly to Coleman, meant that "a just result under the standards governing decision" was not reached. Strickland v. Washington, 466 U.S. 668, 687 (1984).[25] See also Daugherty v. Dugger, 839 F.2d 1426, 1428 (11th Cir. 1988), cert. denied, 109 S. Ct. 187 (1989) (counsel would be ineffective for failure to object to a jury instruction when "the instruction is improper . . . a reasonably competent attorney would have objected to the instruction, and the failure to object was prejudicial").

25. Counsel's failure to object at trial meant that they could not cure their error when representing Coleman on direct appeal. See Coleman v. Commonwealth, 307 S.E.2d at 876.



App. 3

NO. 87-5448

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ROGER KEITH COLEMAN
Petitioner,
v.
GARY L. BASS, WARDEN,
Mecklenburg Correctional Center,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Roger Keith Coleman, respectfully petitions for a writ of certiorari to review the judgment of dismissal entered by the Supreme Court of Virginia on May 19, 1987.

OPINIONS BELOW

The judgment of the Supreme Court of Virginia dismissing Petitioner's petition for appeal is reproduced at Appendix 1. The order of the Supreme Court of Virginia denying Petitioner's Petition for Rehearing is reproduced at Appendix 2. The June 23, 1986 "opinion-letter" of Judge Glynn R. Phillips, Circuit Court of Buchanan County, Virginia, is reproduced at Appendix 3. The Final Order of that court, dated September 4, 1987 and entered on the docket September 9, 1987, is reproduced at Appendix 4.

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of his first state habeas corpus petition, apparently because the Notice of Appeal was not filed within 30 days of the signing of the final judgment below, although it was filed within 30 days of the entry (filing) of the final judgment below.[1] In refusing to consider the merits of Coleman's petition for appeal, the court ignored established precedent and the explicit language of its own rule. Under the Supreme Court of Virginia's novel interpretation, Petitioner's Notice of Appeal was one day late. On this basis alone, the court summarily dismissed Coleman's petition for appeal -- even though he raised several substantial federal constitutional arguments and the Commonwealth could not possibly have suffered any prejudice.[2] On June 12, 1987, again, without opinion, the Supreme Court of Virginia denied Mr. Coleman's Petition for Rehearing.

Roger Keith Coleman was convicted of capital murder in the Circuit Court for Buchanan County and sentenced to death. After exhausting his direct appeals to the Supreme Courts of Virginia and of the United States,[3] Coleman filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County. A

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[1] The Supreme Court of Virginia dismissed Petitioner's petition for appeal and denied his Petition for Rehearing, both without opinion. Accordingly, Petitioner can only assume that the court adopted the Commonwealth's position as articulated in its briefs.

[2] Under the court's ruling, the Notice of Appeal was due on Monday, October 6 (the first working day after October 4, the date that the Notice was due under the Commonwealth's reasoning) rather than October 7. Petitioner's Notice of Appeal was mailed to the court clerk and to the Commonwealth on the 6th, and was received by both on October 7. If Petitioner had hand-delivered the Notice to the clerk, rather than mailed it, and had still mailed a copy to the Commonwealth -- a perfectly acceptable practice -- the Commonwealth would have received notice on the same day, but the Notice would have been timely filed. Certainly the Commonwealth suffered no prejudice from the fact that the Notice of Appeal happened to be sent by mail, rather than hand-delivered, to the clerk.

[3] Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied, 456 U.S. 1109 (1984).

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## PRELIMINARY STATEMENT

Petitioner Roger Keith Coleman respectfully submits this reply in support of his Petition for a Writ of Certiorari. The Petition makes clear that certworthy issues are presented for review. The Commonwealth distorts and trivializes these issues by characterizing the district court's opinion on the motion to dismiss as a ruling on the merits and a resolution of the disputed facts while hiding behind the one-day late filing of Coleman's appeal to avoid proper consideration of his claims.

The Court should grant certiorari to decide the substantial federal questions at issue in Coleman's case: First, under the Fourth Circuit's holding, a state may arbitrarily deprive an individual of a state-created liberty interest without violating federal due process. Second, the circuits are split on the question of whether Harris v. Reed allows a federal court to examine extrinsic evidence to determine whether an ambiguous state court order constituted a decision on the merits of a petitioner's federal claims. Third, the circuit courts disagree about whether Murray v. Carrier means that conduct by a post-conviction attorney, no matter how ineffective, can never constitute cause to justify waiver of a procedural default.

## I.

## COLEMAN'S FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HE WAS ARBITRARILY DENIED A STATE-CREATED LIBERTY INTEREST TO JURY UNANIMITY ON THE AGGRAVATING CIRCUMSTANCES.

The Commonwealth's attempt to argue that Coleman's federal due process, capital sentencing claim is "constitutionally irrelevant" simply misapprehends his claim. See Respondent's Brief ("Resp. Br.") at 7. Coleman does not contend that he had a federal substantive right to unanimity on the aggravating circumstances; rather, he argues that he was arbitrarily denied his state-created entitlement to juror unanimity as to the aggravating circumstances. Arbitrary denial of a state-created liberty interest violates federal due process. See Hicks v. Oklahoma, 447 U.S. 343 (1980); Petition for a Writ of Certiorari ("Ptn.") at 9-10.[1]

1. Respondent's misconstruction of Coleman's due process is highlighted by his mistaken invocation of the Court's "new rule" principle. Resp. Br. at 9 n.4. The new rule principle states that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 109 S. Ct. 1060, 1075 (1989). The constitutional rule at issue here is the due process right enumerated in Hicks v. Oklahoma, not a claim like that raised in Lowenfield v. Phelps, 484 U.S. 231 (1988). Hicks was decided in 1980, prior to Coleman's trial and appeal.

Respondent's argument is based on the flawed premise that Virginia law does not require unanimity as to a particular aggravating circumstance before a death sentence may be imposed. Resp. Br. at 7-8. Although the Virginia Supreme Court has never explicitly held that unanimity is required, Virginia precedent requires such unanimity. In Smith v. Commonwealth, 219 Va. 455, 472, 248 S.E.2d 135, 145 (1978), cert. denied, 441 U.S. 957 (1979), which reviewed the Virginia sentencing scheme, the Virginia Supreme Court stated that the "jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense." The jury must therefore provide a "recitation of a finding of either 'dangerousness' or 'vileness.'" Id. at 472, 248 S.E.2d at 145-46 (emphasis added).

Although the Smith court did not discuss the way in which unanimity should be ensured, two justices in a subsequent case stated that a verdict form identical to that used in Coleman's case violated Virginia law because unanimity as to an aggravating circumstance was not guaranteed. Quintana v. Commonwealth, 224 Va. 127, 152-55, 295 S.E.2d 643, 656-57 (1982) (Poff, J., joined by Stephenson, J., concurring in part and dissenting in



part), cert. denied, 460 U.S. 1029 (1983).[2] Justice Poff reasoned that unanimity was required because:

> It is axiomatic that a jury's verdict in a criminal case must be unanimous. Va. Const., art. I, § 8, Rule 3A:24(a). When the legislature conditions a penalty upon [aggravating circumstances], a jury's verdict is not unanimous unless its findings are unanimous. Id.

The Smith decision and Justice Poff's opinion in Quintana are cited to as supporting authority for Virginia Model Jury Instruction 34.130, which ensures unanimity.[3]

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2. The Quintana majority did not reach the unanimity issue because the appellant had ratified the verdict form at trial and raised the issue only in his brief to the Virginia Supreme Court. Quintana, 224 Va. at 148, 295 S.E.2d at 653 n.6.

3. Va. Model Jury Instruction 34.130. This instruction provides four "alternative jury verdicts" and instructs the jury to "[c]ross out any paragraph, word or phrase which you do not find beyond a reasonable doubt." The four alternative jury verdicts are: (1) the jury found dangerousness and vileness, and sentences the defendant to death; (2) the jury found dangerousness and sentences the defendant to death; (3) the jury found vileness and sentences the defendant to death; or (4) the jury sentences the defendant to life imprisonment. The case cited by respondent, Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980), is not to the contrary. Clark rejected a challenge by the defendant that the jury instruction -- which had not been objected to at trial -- failed to clarify which subpart of the "vileness" predicate the jury found. Neither Clark nor any other Virginia Supreme Court case has found that a sentence of death could be imposed without juror unanimity as to either the vileness or dangerousness predicate.

Justice Poff noted that prior Virginia cases had ensured unanimity either through clarifying jury instructions or jury polling. Quintana, 224 Va. at 154 n.*, 295 S.E.2d at 657 n.* (citing Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980) (a clarifying jury instruction) and (James D.) Briley v. Commonwealth, 221 Va. 563, 577, 273 S.E.2d 57, 66 (1980) (juror polling)). Subsequent cases have similarly ensured unanimity. See, e.g., Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985) (verdict form used "and" not "or"), cert. denied, 478 U.S. 1010 (1986); Frye v. Commissioner, 231 Va. 370, 394, 345 S.E.2d 267, 284 (1986) (verdict form and juror polling). In Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, cert. denied, 109 S. Ct. 3201 (1989), a case on which respondent relies, the court also assured unanimity by polling the jury.

In short, Virginia law requires unanimity as to the aggravating circumstance or circumstances used to impose the sentence of death. Arbitrary denial of that right to Roger Coleman violated due process.[4]

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4. Any procedural default arising out of Coleman's trial counsel's failure to raise the sentencing issue at trial and on appeal should be waived. Counsel's failure to do basic research into Virginia capital sentencing law constitutes ineffective assistance of counsel that justifies waiver of the procedural
(continued...)



II.

## THE VIRGINIA SUPREME COURT'S ORDER DISMISSING COLEMAN'S APPEAL WOULD HAVE BEEN FOUND AMBIGUOUS UNDER THE PRECEDENT OF OTHER CIRCUITS.

### A. The Circuits Are Split As To What Constitutes An Ambiguous Decision.

The conflict among the circuits with respect to the application of Harris v. Reed, 489 U.S. 255 (1989), does not concern the proper federal court treatment of an ambiguous state decision, but rather what constitutes an ambiguous state decision and what evidence, beyond the opinion itself, a federal court may use to decide whether or not the decision is ambiguous.[5] By using extrinsic

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4.(...continued)
default. See Hyman v. Aiken, 824 F.2d 1405, 1416 (4th Cir. 1987). The Quintana opinion, which was issued a year before the decision in Coleman's appeal, should have been relied upon by Coleman's counsel on appeal.

5. The Commonwealth's assertion that Coleman is bound by prior concessions is belied by its own submission. While the Commonwealth's Brief in Opposition quotes a sentence from a prior submission by Coleman out of context, the appendix attaching the relevant portion of the prior submission reveals that Coleman conceded nothing. Resp. Br. at 10; Resp. Br. App. at 4-5. The petition stated that the Virginia Supreme Court dismissed the appeal of Coleman's state habeas corpus petition, "apparently because the Notice of Appeal was not [timely] filed." (Emphasis added.) A footnote to that sentence noted:

(continued...)

evidence to explain away the ambiguity in the Virginia Supreme Court's order, the Fourth Circuit has put itself on the wrong side of that conflict.

Because Harris sought to conserve federal judicial resources and preserve the integrity of the state courts by preventing federal court second guessing of state procedural default questions, courts in the Second, Third, Sixth, and Ninth Circuits have construed the Harris plain statement rule to mean that a decision is ambiguous -- and therefore must be presumed to be on the merits -- unless its reliance on procedural default is clear on its face. Cf. Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("the independence of [the] alleged state ground [must be] apparent from the four corners of the opinion"). See Ptn. at 24-31.[6]

On its face, the Virginia Supreme Court's summary order is clearly ambiguous. The order does not mention procedural default or the fact that the notice of appeal was filed one day late. It does not even cite Virginia Rule 5:9 (the rule relied on by the Fourth Circuit in its interpretation of the order) or Saunders v. Reynolds, 214 Va. 197, 204 S.E.2d 421 (1974) (the Virginia case on which the Commonwealth relies in its attempt to explain what the Virginia court was doing). Nor does it state that the appeal was being dismissed "for the reasons stated in the Commonwealth's motion to dismiss." Rather,

---

5.(...continued)

> The Supreme Court of Virginia dismissed Petitioner's petition for appeal and denied his Petition for Rehearing, both without opinion. Accordingly, Petitioner can only assume that the court adopted the Commonwealth's position as articulated in its briefs. (Emphasis added.)

Harris v. Reed rejected such assumptions. It required that state courts' reliance on procedural default be clear and express. As the quotes above demonstrate, petitioner has never conceded that the Virginia Supreme Court's order dismissing his appeal was clear and express.



---

6. The conflict as to whether extrinsic evidence as to state law, a prior state court decision or the arguments presented to the state court may be used to help interpret an ambiguous state court decision has deepened in the months since Coleman prepared his petition for certiorari. Compare, e.g., Barker v. Estelle, 1990 U.S. App. LEXIS 15800 (9th Cir. Sept. 11, 1990)(following Nunnemaker v. Ylst, 904 F.2d 473 (9th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3054 (U.S. July 9, 1990) (No. 90-68)) and Johnson v. Burke, 903 F.2d 1056, 1060 (following Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989), petition for cert. filed, No. 90-5192 (U.S. July 11, 1990)), with Prihoda v. McCaughtry, 1990 U.S. App. LEXIS 14074 (7th Cir. Aug. 14, 1990) (disagreeing with 9th Circuit and following Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir. 1989) petition for cert. filed, No. 89-7593 (U.S. May 21, 1990)). See also Boulware v. Erhard, 1990 U.S. Dist. LEXIS 11028 (E.D. Pa. Aug. 21, 1990).

the order listed all the papers filed by both parties -- papers that included briefs on the merits as well as on procedural default -- and, "[u]pon consideration whereof," granted the Commonwealth's motion and dismissed the appeal.

The Commonwealth nonetheless contends that "[a]n order which expressly grants a motion to dismiss, the sole basis of which was the untimely filing of a notice of appeal, clearly satisfies the plain statement rule set forth in Harris." Resp. Br. at 11. The Fourth Circuit, bolstered by its peek at Virginia Rule 5:9, apparently accepted that logic. But that position directly conflicts with a line of Sixth Circuit cases holding that denials without opinion of motions to file delayed appeals cannot be presumed to be based on procedural grounds. See, e.g., Johnson v. Burke, 903 F.2d 1056, 1059 (6th Cir. 1990) (rejecting state's assertion that denial of an application to file a delayed appeal is "inherently a decision that relies on procedural grounds"); Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989).

Petitioner submits that the Sixth Circuit's position is the correct reading of Harris. Harris rejected the view that federal courts should attempt to cure ambiguity by examining the arguments presented to the



state court. 109 S. Ct. at 1041 n.4, 1044. A summary grant or denial of a motion, no matter how "inherently procedural," cannot be a "clear and express" statement of reliance on procedural default, unless the order states that relief is denied "for the reasons stated in the State's motion papers."[7]

B. The Court Should Grant Certiorari To Protect The Uniformity Of Federal Law.

Contrary to the Commonwealth's assertion, there are "serious and important" reasons to grant certiorari in this case. In the few months since Coleman prepared his certiorari petition, approximately 50 additional federal court opinions have cited Harris, bringing the total to well over 160 in the year and a half since Harris was issued. The circuits' disagreement as to whether evidence beyond the face of a state court decision may be considered to determine whether the decision is ambiguous guarantees that the lower federal courts will continue to issue widely divergent decisions in this area. The opportunity for federal habeas review of federal constitutional

7. Or, as Harris itself suggests, "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.'" Harris, 109 S. Ct. at 1045 n.12.

claims will thus continue to vary depending on where a prisoner is incarcerated.

Uniformity of federal law is the fundamental goal of the plain statement rule. See Michigan v. Long, 463 U.S. at 1040 ("there is an important need for uniformity in federal law, and . . . this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion"). Nowhere is the need for uniformity more pressing than in a case such as this, where Roger Coleman has been sentenced to death. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all"). The Court should grant certiorari in this case to end the lack of uniformity created by the circuits' differing interpretations of the Harris v. Reed plain statement rule.

III.

COLEMAN'S STATE HABEAS COUNSEL'S ONE-DAY LATE FILING OF AN APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL AND JUSTIFIES WAIVER OF THE PROCEDURAL DEFAULT.

The Commonwealth fails even to address the petitioner's demonstration that by prohibiting ineffec-



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OF COUNSEL

September 18, 1990



FEDERAL EXPRESS

Joseph Spaniol, Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Roger Keith Coleman, Petitioner v. Charles E. Thompson, Warden, Mecklenburg Correctional Center for the Commonwealth of Virginia, Respondent
No. 89-7662

Dear Mr. Spaniol:

Enclosed for filing is the Reply Brief in Support of Petition For A Writ Of Certiorari in the above-captioned case. Petitioner has previously filed a motion for leave to proceed in forma pauperis.

Sincerely yours,

Daniel J. Goldstein

Enclosure

cc: Donald R. Curry, Esq. (by U.S. Mail and Federal Express)

tiveness of counsel claims from being raised until collateral review, Virginia has erected an external impediment to a defendant's assertion of those claims in the state courts during proceedings where the defendant is constitutionally entitled to counsel. As a result, ineffective assistance of post-conviction counsel must constitute cause at least as to those claims.

A refusal to recognize cause under these circumstances would be contrary to the Court's statement in Murray v. Carrier that procedural default rules should be enforced in the same manner whether the default occurred on direct review or in collateral proceedings. 477 U.S. 478, 490-91 (1986). If default rules are to be enforced similarly at all stages, the decision to waive a default should be based on the same standard. Attorney conduct that justifies waiver of a default on direct review should also justify waiver on collateral review.

In Murray, the Court did not decide whether the conduct of an attorney who was not constitutionally required could constitute cause whenever that conduct fell "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). The Court stated that "so long as a defendant is represented by counsel whose performance is not consti-



tutionally ineffective under the standard established in Strickland v. Washington, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." 477 U.S. at 488.

Murray's invocation of the Strickland standard in the context of a cause and prejudice analysis has left lower courts without clear guidelines for waiving defaults caused by ineffective post-conviction counsel. In Coleman's case, the Fourth Circuit ruled that an attorney's conduct can constitute cause only if the attorney was constitutionally required. App. at a14-15; see also Buelow v. Dickey, 847 F.2d 420 (7th Cir. 1988), cert. denied, 109 S. Ct. 1168 (1989); Whitten v. Allen, 727 F. Supp. 28 (D. Me. 1989).[8] Under that approach, attorney conduct during collateral proceedings, no matter how egregious, will never constitute cause. By contrast, other courts have found that when ineffective assistance of counsel is assigned as cause and not as a substantive right, the attorney whose conduct is at issue need not be constitutionally required. See, e.g., Shook v. Clarke, 894 F.2d 1496 (8th Cir. 1990); Madyun v. Young, 852 F.2d

8. Toles v. Jones, 888 F.2d 95 (11th Cir. 1989), which held that cause could not be satisfied by the ineffectiveness of coram nobis counsel, was vacated and a petition for rehearing en banc was granted. 905 F.2d (11th Cir. June 7, 1990).

1029, 1033 n.3 (7th Cir. 1988) (requiring a constitutional right to counsel for instances in which deficient performance can be cause is based upon a "non sequitur").[9]

Contrary to the Commonwealth's assertions, a finding of cause is not the same as finding a right to counsel for collateral proceedings. Resp. Br. at 14-15. Finding cause simply allows a petitioner to raise his federal claims in federal court and does not create any new substantive rights or remedies. The requirements for a finding of cause therefore need not be as strict as the standard applied in deciding if an independent constitutional right exists. Indeed, the Court has previously recognized that counsel's actions short of constitutional violations may constitute cause. See Reed

---

9. Respondent cannot avoid the Eighth Circuit precedent by arguing that no waiver of the default was allowed in Harper v. Nix, 867 F.2d 455 (8th Cir.), cert. denied, 109 S. Ct. 3194 (1989). Resp. Br. at 13. As the Eleventh Circuit has recognized, the Eighth Circuit has applied an "ineffective assistance analysis to determine whether the failure of an attorney to raise an issue on a state collateral challenge constitutes cause." Johnson v. Dugger, 1990 U.S. App. LEXIS 14759 (11th Cir. Aug. 21, 1990). The Eighth Circuit's own interpretation of the Harper precedent in Shook and Shaddy v. Clarke, 890 F.2d 1016, 1018 n.4 (8th Cir. 1989), makes clear that the Harper decision stands for the proposition that, if post-conviction counsel's performance is ineffective, the default will be waived. That the Harper court found counsel's conduct to be adequate does not alter the analysis.



v. Ross, 468 U.S. 1 (1984) (recognizing that cause could be satisfied when an attorney failed to raise a "novel" legal theory without any suggestion that the attorney's failure was an independent constitutional violation).

The Commonwealth wrongly suggests that the Fourth Circuit considered the merits of Coleman's underlying claims. Resp. Br. at 12. The Fourth Circuit undertook no such inquiry. Although it concluded that enforcing the default would not result in a "fundamental miscarriage of justice," this determination does not approach a full review of the merits or even a statement that Coleman suffered no prejudice as a result of that default. See Murray v. Carrier, 477 U.S. at 496 ("fundamental miscarriage of justice" is limited to "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); App. at a15.[10]

---

10. Coleman has maintained his innocence from the outset and included facts supporting this claim in his federal habeas petition.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for a Writ of Certiorari, Petitioner Roger Keith Coleman respectfully requests that his Petition for a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
September 18, 1990

Respectfully submitted,

John H. Hall*
Daniel J. Goldstein
Marianne Consentino
Richard G. Price

DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022

Attorneys for Petitioner
Roger Keith Coleman

*Counsel of Record



## Affidavit of Service

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

DANIEL JOEL GOLDSTEIN, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am associated with the law firm of Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022.

2. I caused a copy of the annexed Reply Brief In Support Of Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit in the case captioned Roger Keith Coleman, Petitioner v. Charles E. Thompson, Warden, Mecklenburg Correctional Center of the Commonwealth of Virginia, Respondent to be served by first-class mail, postage pre-paid, on Donald R. Curry, Esq., Attorney for Respondent, 101 No. Eighth Street, Richmond, Virginia 23219 (telephone: (804) 786-2071) on the 18th day of September, 1990.

3. I declare under penalty of perjury that the foregoing is true and correct.

Sworn to before me this
18th day of September, 1990

THELMA GARVIN
Notary Public, State of New York
No. 03-4706714
Qualified in Bronx County
Commission Expires

No. 89-7662



In The

# Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

*Petitioner,*

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER OF THE
COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit**

## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED MAY 29, 1990**
**CERTIORARI GRANTED OCTOBER 29, 1990**

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| 5/17/88 | Respondent's Motion to Dismiss Petition (and Memorandum in Support). |
| 7/15/88 | Petitioner's Memorandum in Opposition to Motion to Dismiss and Motion For An Evidentiary Hearing (and Memorandum in Support). |
| 7/25/88 | Respondent's Reply to Memorandum in Support of Motion To Dismiss; Memorandum in Opposition to Motion for An Evidentiary Hearing. |
| 8/11/88 | Petitioner's Reply Memorandum In Support of Motion For An Evidentiary Hearing; Surreply in Opposition to Motion to Dismiss. |
| 8/15/88 | Respondent's Rebuttal In Support of Motion to Dismiss. |
| 12/6/88 | Memorandum Opinion. |
| 1/3/89 | Notice of Appeal. |
| 1/4/89 | Certificate of Probable Cause to Appeal. |

United States Court of Appeals for the Fourth Circuit (89-4002)

| | |
|---|---|
| 1/10/89 | Death penalty case docketed. |
| 1/12/89 | Record on appeal filed. |
| 1/17/89 | Docketing statement filed by Appellant Roger K. Coleman. |
| 3/27/89 | Brief and Joint appendix filed by Appellant. |

| | |
|---|---|
| 4/21/89 | Brief filed by Appellee. |
| 5/8/89 | Reply brief filed by Appellant. |
| 10/2/89 | Oral argument heard. |
| 1/31/90 | Published opinion filed. |
| 1/31/90 | Judgment order filed. |
| 2/14/90 | Petition filed by Appellant Roger K. Coleman for rehearing. |
| 2/27/90 | Motion for rehearing, suggestion for rehearing en banc denied. |
| 3/23/90 | Mandate issued. |

---



COMMONWEALTH of VIRGINIA

TWENTY-NINTH JUDICIAL CIRCUIT

June 23, 1986

Jacqueline G. Epps
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Washington, D.C. 20036

John M. Farmer, Esquire
Wolfe & Farmer, P.C.
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Norton, Virginia 24273

Re: Roger Keith Coleman v. Gary L. Bass, Warden
Mecklenburg Correctional Center

Dear Ms. Epps, Mr. Green and Mr. Farmer:

This is a Petition for a Writ of Habeas Corpus filed by the Petitioner in the Circuit Court of Buchanan County to a conviction for capital murder for which the Petitioner was sentenced to death and after the Supreme Court of Virginia affirmed said conviction and upheld the death penalty. This Court heard evidence on said Petition for two full days on November 12th and 13th, 1985. Counsel for the Petitioner filed a memorandum in support thereof on March 11, 1986, the Respondent filed a post hearing memorandum in support of the motion to dismiss on May 19, 1986, the Petitioner filed a reply memorandum on June 18, 1986.

The Court is being asked to make findings of facts and conclusions of law on the following issues:

I. WAS THE PETITIONER CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY?

A) Do the facts show that George Marrs was a biased juror and if so does that bias entitle Roger Keith Coleman to a new trial?

II. WAS THE PETITIONER DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

A) Did defense counsel conduct a proper investigation and properly prepare the case?

B) Did defense counsel make an adequate investigation and preparation for the change of venue hearing?

C) Did defense counsel make an adequate investigation and preparation for the alibi defense and the preparation for sentencing?

D) Was the performance of defense counsel deficient and if so did it prejudice the defendant?

III. DID THE PROSECUTION MAKE IMPROPER REMARKS IN THE CLOSING ARGUMENT AND IF SO DID IT PREJUDICE THE PETITIONER?

IV. DID THE EXCLUSION OF DEATH PENALTY OPPONENTS FROM THE JURY VIOLATE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY?

V. WHERE PETITIONER'S DUE PROCESS RIGHTS VIOLATED UNDER *MIRANDA v. ARIZONA*?



VI. WERE IMPROPER INSTRUCTIONS GIVEN AND IF SO DID THE GIVING OF SAID INSTRUCTIONS PREJUDICE PETITIONER?

VII. ARE VIRGINIA'S CAPITAL MURDER STATUTES AND SENTENCING PROCEDURES UNCONSTITUTIONAL?

I. WAS THE PETITIONER CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY?

A) Do the facts show that George Marrs was a biased juror and if so does that bias entitle Roger Keith Coleman to a new trial?

As to this issue the court must look at the evidence of Opal and Texas Rash and the evidence of George Marrs introduced at the November 12th and 13th hearing on the Petition for Writ of Habeas Corpus. The gist of the testimony of Opal and Texas Rash was to the effect that the juror George Marrs wanted to be a member of the jury trying the Petitioner and that he felt the Petitioner was guilty, these alleged statements having been made before the trial. The George Marrs testimony before this Court clearly denied any discussion with the Rashes or anyone else to the effect that he thought Coleman was guilty. Therefore, the real question here is one of credibility. It should also be noted that the juror on voir dire stated that he had not formed any opinion as to the guilt or innocence of Mr. Coleman. (Trial Transcript, Page 182)

Even if the juror had discussed the case before trial he stated under oath on voir dire that he had not formed an opinion as to the innocence or guilt of Coleman. This

Court therefore finds that the testimony of George Marrs was not biased and was creditable and that he was a fair and impartial juror who decided the issues solely on the evidence introduced at the trial.

II. WAS THE PETITIONER DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

A) Did defense counsel conduct a proper investigation and properly prepare the case?

The standard for determining the issue of ineffective assistance of counsel to be applied in this case will be as set out in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984) and in *Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983). In this connection the Petitioner in order to prevail must first show that counsel's performance was deficient which in effect is a showing that counsel made errors so serious that he was not functioning as counsel guaranteed the Defendant by the Sixth Amendment. Secondly, the Petitioner must show that the deficient performance prejudiced the defense. Thus, there must be a showing that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. In *Stokes, supra*, the Supreme Court of Virginia held that to be effective an attorney must exercise the "care and skill which a reasonably competent attorney would exercise for similar services under the circumstances." 226 Va. at 117.

Applying these guidelines this Court is of the opinion that it is not necessary to personally interview each and every witness before testifying in the trial. Usually,



as in this case there are numerous investigating officers reports, various photographs, results of scientific tests and other evidence most of which can be reviewed by counsel from the Commonwealth's file. Therefore, it is not necessary for counsel to talk to every witness if the same information can be elicited from the key investigating officers and the documented file.

B) Did defense counsel make an adequate investigation and preparation for the change of venue hearing?

Counsel for Petitioner sent a draft affidavit to Mrs. Coleman and asked her to collect signatures. This Court cannot presume that signatures or affidavits could have been obtained before the hearing on the change of venue motion. The fact some affidavits were obtained after the death sentence had been imposed does not necessarily show they could have been obtained before the venue hearing. It is significant that 49 affidavits were obtained by the Commonwealth saying the Defendant could obtain a fair trial in Buchanan County.

"The law presumes that a Defendant can receive a fair trial from the citizens of the County or City in which the offense was committed. To overcome that presumption, the Defendant must clearly show that there is such a widespread feeling of prejudice on the part of the citizens that will be reasonably certain to prevent a fair and impartial trial." *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979). Even a majority of the sex witnesses testifying at the habeas hearing on November 12th and 13th felt they could have given the Defendant a fair trial.

More importantly the Petitioner failed to carry the burden of showing prejudice as defined in *Strickland, supra.*

The Court finds that defense counsel did make an adequate investigation and preparation for the change of venue hearing although counsel should have made a greater effort to obtain additional affidavits but this Court could not say the Defendant was prejudiced by such failure.

C) Did defense counsel make an adequate investigation and preparation for the alibi defense and the preparation for sentencing?

Without reciting the evidence on the alibi defense in its totality but in summary the evidence adduced at the trial of Defendant indicates to this Court that the cross-examination of the witnesses by counsel for Defendant clearly shows they had an excellent understanding and knowledge of the facts of the case. Therefore, the Court finds that defense counsel made an adequate investigation and preparation for the alibi defense.

As to the preparation for sentencing it should be noted that the Defendant took the position that he didn't desire to present evidence as to mitigating circumstances. This could indicate one or more reasons. First, maybe he didn't have any cogent mitigating evidence to present and secondly, maybe he was fearful of prior convictions and other damaging evidence being presented by the Commonwealth. The Court finds that counsel for Defendant at the trial had made adequate preparation for the



sentencing phase and that the Defendant was not prejudiced.

D) Was the performance of defense counsel deficient and if so did it prejudice the defendant?

On the issue of ineffective assistance of counsel the Court finds that counsel exercised the care and skill which a reasonably competent attorney would exercise under similiar [sic] circumstances in investigating and preparing for trial and the Petitioner has failed to establish prejudice resulting from any deficiency.

Considering all of the evidence introduced at the trial, the habeas corpus hearing and the hearing for change of venue the Court finds that the performance of counsel for Petitioner was not deficient and did not prejudice the case.

## III. DID THE PROSECUTION MAKE IMPROPER REMARKS IN THE CLOSING ARGUMENT AND IF SO DID IT PREJUDICE THE PETITIONER?

The Court adopts the findings of fact and conclusions of law as set out in Respondents brief beginning on page 32 with reference to the following:

1. The prosecuting attorneys did not distort the testimony of Elmer Gist regarding the probability that the pubic hairs found on the victim's body were those of the Petitioner. Counsel's comment that it was "extremely unlikely" that the hairs could have come from anyone

else (App. 757-58, 783) was fair inference from the testimony of Elmer Gist.

2. The prosecutor's statement that Elmer Gist testified that he found type "O" blood on the left leg of the pants that the Defendant was wearing on the night of the murder was an insignificant misstatement fact which did not constitute misconduct prejudicial to the Petitioner.

3. The prosecutor's statement suggesting that the Petitioner may have read more than one book or article on the length of time blood will stay on a knife was a fair interpretation of the evidence which did not constitute prejudicial misconduct.

4. The prosecutor's comments suggesting the reason why the Petitioner went to the residence of Sandra Stillner constitutes fair inferences that could be drawn from the evidence. These comments were not based on speculation, but based on the evidence adduced at trial.

5. The prosecutor's characterization of the Petitioner as vile was fully supported by the evidence and fair comment thereon. In fact, vileness is an element required to be proved before the death penalty can be imposed. The prosecutor's characterization of the Petitioner as cold, calculating, inhumane and animalistic was supported by the evidence and fair comment thereon. The prosecutor's remarks did not constitute prejudicial misconduct.

6. The prosecution did not imply that the jury would not be responsible for sentencing the Petitioner to death by stating that the Petitioner by his past actions and by his actions in the brutal slaying and rape of the



victim signed his own death warrant. This comment did not constitute a suggestion to the jury that some other entity had the ultimate responsibility for making the decision of whether or not the death sentence should be imposed. This case is distinguishable from *Caldwell v. Mississippi*, 105 S. Ct. 2633, 37 Cr L 3089 (6/11/85) where the jury was led to believe that the responsibility for imposing the death penalty rest elsewhere, with the Judge who imposes the punishment. Also, this case is distinguishable from *Frey v. Commonwealth* (June, 1986), where the Supreme Court of Virginia set aside the sentence in a capital case based on similar facts and circumstances set out in *Caldwell, supra.*

7. The VanDyke time card did not constitute exculpatory or critical evidence. The failure to provide it did not result in prejudice to the Defendant.

8. The exclusion of death penalty opponents from the jury did not violate Petitioner's right to a fair and impartial jury. This issue was clearly settled in *Lockhart v. McCree*, 39 Cr L 102 (May 5, 1986) by the Supreme Court of the United States as shown by the following language:

> "Prosecutor may remove for cause at the start of a bifurcated capital trial prospective jurors so opposed to capital punishment therefore answering a question raised by *Witherspoon v. Illinois*, 391 U.S. 510 (1968)."

9. The court did not err in presenting to the jury an aggravating circumstance instruction in verdict form phrased in the alternative. The law does not require that the jury unanimously agree on one or the other aggravating circumstance in order to impose the death penalty.

The jury need only be convinced beyond a reasonable doubt that at least one of the two components exist.

10. The jury was not required to find torture and physical abuse in order to conclude that an aggravated battery had been committed.

11. The omission of the requirement of torture from the "agggravated battery" instruction given to the jury did not violate *Godfrey v. Georgia*.

12. To impose the death penalty, the jury need not be convinced beyond a reasonably doubt that aggravating factors outweigh mitigating factors.

13. The instructions given by the Court were adequate to inform the jury that their decision to impose the death penalty must be unanimous and that a life sentence must be imposed if a single juror was not convinced beyond a reasonable doubt that the death penalty was an inappropriate sentence.

14. The instructions given by the Court were adequate to inform the jury that they need not impose a death penalty notwithstanding the finding of an "aggravating circumstance" beyond a reasonable doubt.

15. The Court's instructions were adequate to inform the jury that there were no limitations on what they could consider mitigation and that anything could be considered in mitigation of the death penalty.

16. Virginia's capital murder statute in sentencing procedures are constitutional.



IV. DID THE EXCLUSION OF DEATH PENALTY OPPONENTS FROM THE JURY VIOLATE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY?

These are covered in the above findings of fact and conclusions of law.

V. WERE PETITIONER'S DUE PROCESS RIGHTS VIOLATED UNDER *MIRANDA V. ARIZONA*?

As to the Miranda rights not having been given the Defendant at the time of interrogation by Investigator Davidson the evidence shows it had not reached the "custodial interrogation" stage. Recent decisions of the United States Supreme Court have eroded the clout of the Miranda Rights as originally set out in *Miranda v. Arizona,* much like the demise of the Fourth Amendment as it pertains to search and seizure.

VI. WERE IMPROPER INSTRUCTIONS GIVEN AND IF SO DID THE GIVING OF SAID INSTRUCTIONS PREJUDICE PETITIONER?

VII. ARE VIRGINIA'S CAPITAL MURDER STATUTES AND SENTENCING PROCEDURES UNCONSTITUTIONAL?

These are covered in the above findings of fact and conclusions of law.

## CONCLUSION

In conclusion this Court is of the opinion that counsel for the Petitioner at all stages of the trial acted in such a manner as afforded said Petitioner effective assistance of counsel and that counsel functioned as counsel guaranteed a Defendant in a criminal trial by the Sixth Amendment and in accordance with the standards and guidelines set out in *Strickland, supra* and in *Stokes, supra.* At stated by this Court in the Habeas Corpus proceeding of *Everette O. Shrader, Petitioner vs. Warden of Bland Correctional Center, Respondent* (July 22, 1985) in which the Petitioner was denied a Writ of Habeas Corpus as to two life sentences for two murders – "Every Defendant is entitled to a fair trial but not necessarily a perfect trial." In *Marzullo v. Maryland*, 561 F2d 540 (4th Circuit 1977) that Court likewise held that a Defendant is entitled to effective assistance of counsel, not necessarily errorless assistance of counsel. In *United States v. Kronick* decided in May, 1986, the Supreme Court of the United States denied a claim of a Petition as to ineffective assistance of counsel even though the appointed counsel was primarily a real estate attorney without any previous criminal trial practice and had been given by the Court only 26 hours in which to prepare the defense. The Supreme Court in the opinion pointed out that the few defenses the defendant had to the charges didn't take long to prepare. The Kronick opinion clearly indicates that a Petitioner must show that his counsel was highly dificient [sic], clearly indicating that counsel made such serious errors and was not functioning as counsel guaranteed the Defendant by the Sixth Amendment. The Court further finds that any allegations in the Petition and the amended Petition not



specifically addressed in this opinion do not constitute grounds for awarding a Writ of Habeas Corpus.

Ms. Epps is directed to prepare an appropriate Order denying the Writ of Habeas Corpus, said Order to be endorsed by Mr. Green and Mr. Farmer and forwarded to the Court for entry.

Very truly yours,

/s/ Glyn R Phillips
Glyn R. Phillips, Judge Designate
P.O. Box 598
Clintwood, Virginia 24228

GRP/jys

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

ROGER KEITH COLEMAN,

Petitioner,

v.

Case No. 119-84

GARY L. BASS, WARDEN, MECKLENBURG CORRECTIONAL CENTER,

Respondent.

FINAL ORDER

This proceeding came to be heard on November 12 and 13, 1985, upon the petition of Roger Keith Coleman for a writ of habeas corpus, the petitioner appearing in person and by David E. Green, Esquire, L. Stevenson Parker, Esquire, and John H. Farmer, Esquire, attorneys representing the petitioner, pro bono, and the respondent appearing by Jacqueline G. Epps, Senior Assistant Attorney General and Kathrine M. Toone, Assistant Attorney General.

Whereupon, after having heard the evidence of the parties and the argument of counsel, the Court is of the opinion that the petition should be denied and dismissed for the reasons set forth in its letter opinion of June 23, 1986, and in the following additional findings of fact and conclusions of law:

Findings of Fact

1. Trial counsel reviewed numerous investigative reports, photographs, results of scientific tests and other



evidence contained in the Commonwealth's file. They also discussed the case with key investigating officers. It was therefore, not necessary for counsel to talk to every witness.

2. Trial counsels' investigation and preparation of the case was adequate although counsel failed to contact or interview all of the prosecution's witnesses.

3. Trial counsel adequately investigated the alibi defense by interviewing the petitioner's wife and grandmother, by interviewing other individuals who could testify as to petitioner's whereabouts on the night of the crime, by reviewing the Commonwealth's Attorney's file, and by talking with key investigating witnesses.

4. The petitioner failed to provide the names of character witnesses although requested to do so by counsel.

5. Trial counsel were aware of the distances the petitioner allegedly traveled between locations on the night of the crime and the approximate time it took to go from one place to another.

6. The Van Dyke time card did not constitute exculpatory or critical evidence and it would have been cummulative of the testimony of Philip Van Dyke.

7. Measuring the depth of Slate Creek would have served no purpose because there was no reason to believe that Slate Creek would have been the same depth at the time counsel was appointed as it was on the night of the crime.

8. Counsel conducted adequate research on hair and blood analysis.

9. Counsel conducted an adequate cross-examination of Elmer Gist and inquired into the basis for Mr. Gist's conclusions.

10. The prosecutor's remarks referring to the petitioner as vile, inhuman, animalistic and a calculating killer were not improper, and they did not render the trial fundamentally unfair.

11. The testimony of witnesses presented by the petitioner during the habeas hearing undenibly [sic] established that there was no widespread prejudice in the community that would have prevented the petitioner from receiving a fair trial.

12. The "mitigating" evidence presented by the petitioner during the habeas hearing was insignificant and grossly inadequate to overcome the aggravating circumstances.

Conclusions of law

1. Counsel's performance was within the range of competence demanded of attorneys in criminal cases and they exercised the care and skill which reasonably competent attorneys would exercise under similar circumstances in investigating and preparing petitioner's case for trial.

2. Petitioner has failed to sustain his burden of establishing that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different.

The Court is also of the opinion that the claims raised in the following paragraphs of the petition should be



alternatively dismissed on the ground that they are procedurally barred under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied, sub nom., Parrigan v. Paderick*, 419 U.S. 1108 (1975): Para. 71, Para. 76, Para. 77, Para 78-84 Para 87-102, Para. 104-109, Para. 113-120, and Para. XII.

The Court is further of the opinion that claims raised in the following paragraphs of the petition should be alternatively dismissed under the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970): Para. 65-75, Para. 110, Para. 111, Para. 112, Para. 126-27. It is, therefore,

ADJUDGED and ORDERED that the transcript of the proceedings resulting in petitioner's conviction be made a part of the record herein and that the petition for a writ of habeas corpus be denied and dismissed, to which action of the Court petitioner notes his exceptions.

The Clerk is directed to forward a certified copy of this Order to the petitioner, petitioner's counsel, David E. Green, Esquire and John M. Farmer, Esquire, and Jacqueline G. Epps, Senior Assistant Attorney General.

Entered this 4th day of September, 1986.

/s/ (illegible)
Judge

I ask for this:

/s/ J. G. Epps
Counsel for the respondent

Seen and objected to:

/s/ J S Parker
Counsel for the petitioner

VIRGINIA: IN THE CIRCUIT COURT OF BUCHANAN COUNTY

ROGER KEITH COLEMAN, Petitioner,

Case No. 119-84

v.

GARY L. BASS, WARDEN, Respondent.

ORDER

Upon consideration of the petitioner's motion to correct the date of entry of judgment, the petitioner's memorandum in support of that motion, and the respondent's response in opposition, the Court is of the opinion that the motion should be denied because final judgment in this case was entered on September 4, 1986 and because the records of this Court correctly reflect that fact at the present time.

It is therefore ADJUDGED and ORDERED that the petitioner's motion be and is hereby denied.

The Clerk of this Court shall forward a certified copy of this Order to the petitioner, counsel for petitioner, and counsel for respondent.

ENTERED this 10th day of November, 1986.

/s/ illegible
Judge

I ask for this:

/s/ Donald (illegible)
Counsel for respondent



Seen and objected to:

/s/ illegible
Counsel for petitioner

STATE OF VIRGINIA,

COUNTY OF BUCHANAN, to-wit:

I, Russell V. Presley, Clerk of the Circuit Court for the County of Buchanan, in the State of Virginia, do hereby certify that the foregoing writing is a true and correct copy of an Order entered in the case of ROGER KEITH COLEMAN VS. GARY L. BASS, WARDEN, bearing date the 10th day of November, 1986, as the same appears of record in my said Office in Civil Common Law Order Book No. 13, page ___.

Given under my hand and Official seal of my said Court, this 4th day of December, 1986.

TESTE: /s/ Russel V. Presley, CLERK
CIRCUIT COURT BUCHANAN COUNTY VIRGINIA

VIRGINIA:

IN THE SUPREME COURT

ROGER KEITH COLEMAN,

Petitioner,

v. Record No. 861147

GARY L. BASS, WARDEN,

Respondent.

MOTION TO DISMISS

Now comes the respondent, by counsel, and moves this Court to dismiss the above-styled appeal. In support of said motion, the respondent says as follows:

1. This case is an appeal of a denial of a petition for a writ of habeas corpus by the Circuit Court of Buchanan County. The petitioner, Roger Keith Coleman, has been convicted of capital murder and sentenced to death. *See Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983).

2. The petition for a writ of habeas corpus was denied by the court below in an order dated and entered September 4, 1986 (See Exhibit I, copy of dismissal order).

3. Coleman filed his notice of appeal in the court below on October 7, 1986. (See Exhibit II, copy of notice of appeal). Thus, the notice of appeal was filed thirty-three (33) days after entry of final judgment.

4. Rule 5:9(a), Rules of the Supreme Court, provides that no appeal shall be allowed unless a notice of appeal is filed with the clerk of the trial court within thirty (30) days after entry of final judgment. The requirements of



that Rule are mandatory. *See Vaughn v. Vaughn*, 215 Va. 328, 210, S.E.2d 140 (1974); *Mears v. Mears*, 206 Va. 444, 143 S.E.2d 889 (1965). The thirty-day time limit cannot be extended. Rule 5:5(a), Rules of the Supreme Court.

5. In his petition for appeal filed December 4, 1986, Coleman states that the judgment of the court below was entered on September 9, 1986 and that his notice of appeal "was timely." (Pet. App. 2). These assertions are rebutted not only by the face of the lower court's order which reflects that it was entered on September 4, 1986, but also by the express rulings of the court below. When Coleman realized that his notice of appeal was untimely, he filed in the court below a "Motion For Order Correcting The Date Of Entry Of Judgment." The court below denied that motion in a letter dated October 31, 1986 and in a subsequent order dated November 10, 1986. (See Exhibits III and IV, copies of letter and order). Both the letter and the order make it clear that final judgment was entered in the court below on September 4, 1986. *See Peyton v. Ellyson*, 207 Va. 423, 430-431, 150 S.E.2d 104, 110 (1966) (final judgment is entered in a habeas corpus case when the habeas judge "signed the order setting forth his judgment").

6. The respondent respectfully requests this Court to give this motion expedited consideration in order to spare the Commonwealth the considerable time and expense it will take to respond to the multitude of claims raised by Coleman in his petition for appeal. The Commonwealth makes this request only because the appeal clearly has not been perfected in a timely manner. No motion has been filed by the respondent to this date

because until the respondent received a copy of the petition for appeal on December 8, 1986, respondent had no notice of any pending proceeding in this Court. Respondent received no notice until this date that the record in this appeal had been mailed to the Clerk of this Court by the clerk of the trial court.

WHEREFORE, the respondent requests this Court to act upon this motion expeditiously and to dismiss the appeal because the notice of appeal was not filed in a timely manner.

Respectfully submitted,
GARY L. BASS, WARDEN
By /s/ Donald Curry
Counsel

Donald R. Curry
Senior Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

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VIRGINIA:

In the Supreme court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 19th day of May, 1987.

Roger Keith Coleman,

Appellant,

against Record No. 861147
Circuit Court No. 119-84

Gary L. Bass, Warden, etc.,

Appellee.

From the Circuit Court of Buchanan County

On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Debra A. Anderson
Deputy Clerk

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of June, 1987.

Roger Keith Coleman,

Appellant,

against Record No. 861147
Circuit Court No. 119-84

Gary L. Bass, Warden of the
Mecklenburg Correctional Center,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 19th day of May, 1987 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ illegible
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA

| | | |
|---|---|---|
| ROGER K. COLEMAN, | : | Civil Action |
| Petitioner, | : | No. 88-0125-A |
| v. | : | AFFIDAVIT OF |
| CHARLES THOMPSON, WARDEN, MECKLENBURG CORRECTIONAL CENTER, | : | JOHN M. FARMER |
| Respondent. | : | |

JOHN M. FARMER, being duly sworn, deposes and says:

1. I am a member of the bar of the Commonwealth of Virginia and a member of the firm of Wolfe & Farmer. I submit this affidavit in support of Roger Coleman's opposition to the Commonwealth's Motion to Dismiss.

2. Wolfe & Farmer and Arnold & Porter ("state habeas counsel") represented Mr. Coleman in his state habeas corpus proceedings held before Judge Glyn Phillips of the Buchanan County Circuit Court.

3. On September 7, 1984, petitioner's state habeas counsel filed an amended petition for a writ of habeas corpus. An evidentiary hearing was held on November 12 and 13, 1985.

4. Judge Phillips sent a letter opinion to state habeas counsel on June 23, 1986, in which he stated why he planned to deny Mr. Coleman's amended petition. Judge Phillips asked the Commonwealth's attorney to prepare a final order embodying the court's ruling.



5. The Commonwealth's attorney prepared a proposed final order, which included extensive findings of fact and conclusions of law that were not present in the Court's letter. State habeas counsel objected to this proposed order. We received no notification of Judge Phillips' ruling on our objection until receipt of the final order. Appended to the final order was a certificate dated September 9, 1986, from the Clerk of the Buchanan County Circuit Court, stating that he was attaching "a true and correct copy of an order dated the 4th day of September," which was entered into the docket of *Coleman v. Bass*, the caption for Coleman's state habeas petition.

6. I determined, based upon the plain language of Virginia Supreme Court Rule 5.9 and my experience as a Virginia attorney, that the time for appeal ran from the date the clerk entered the order in the docket book. According to the final order we received, judgment was entered on September 9, 1986. I therefore believed that petitioner's notice of appeal would be timely if mailed to the Court on October 6, 1986. Therefore, I sent the notice of appeal to the Court on October 6, 1986. The notice of appeal stated that petitioner was appealing the judgment of the court entered on September 9, 1986. I also mailed a copy of the notice to the Commonwealth's attorney on that date.

7. We believed that Mr. Coleman's appeal was meritorious and intended to pursue the merits of the appeal before the Virginia Supreme Court. We intended that the notice of appeal be filed in a timely fashion so as to

assure a hearing of our points on appeal by the Virginia Supreme Court.

/s/ John Farmer
John M. Farmer

Sworn to me this 12th day
of July, 1988

/s/ Tammy A. Absher
Notary Public

(Certificate of Service omitted in printing.)

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA

(Caption Omitted In Printing)

Civil Action No. 88-0125-A
AFFIDAVIT OF DAVID GREEN AND
L. STEVENSON PARKER

DAVID E. GREEN and L. STEVENSON PARKER, being duly sworn, depose and say:

1. Mr. Parker is a member of the bar of the District of Columbia and is associated with the law firm of Arnold & Porter. Mr. Green, also a member of the District of Columbia bar and formerly associated with Arnold & Porter, is now a trial attorney with the Public Integrity Section of the Department of Justice.

2. We, along with John M. Farmer of Wolfe & Farmer ("state habeas counsel"), represented Mr. Coleman in the state habeas corpus proceedings held before Judge Glyn Phillips of the Buchanan County Circuit Court.

3. Mr. Coleman's state habeas counsel filed an amended petition for a writ of habeas corpus on September 7, 1984. A hearing was held before Judge Phillips on November 12-13, 1985. On June 23, 1986, Judge Phillips mailed state habeas counsel a letter setting forth various reasons why Mr. Coleman's amended petition should be denied.

4. This letter did not represent the court's final judgment, however, as the court requested that the Commonwealth's attorney prepare a final order and submit it to the court. The Commonwealth submitted a proposed order, to which we objected.

5. We received notification of the court's judgment when we received the Commonwealth's proposed final order, signed by the Judge. The order was accompanied by a note dated September 9, 1986, from the Deputy Clerk of the Court for Buchanan County. Appended to the order was a certificate, dated September 9, 1986, from Russell Presley, Clerk of the Buchanan County Circuit Court, certifying that he was attaching "a true and correct copy of an order dated the 4th day of September," which had been entered into the docket of the case of *Coleman v. Bass* (the caption for the state habeas corpus proceeding).

6. In determining the date the final order was entered for the purpose of preparing the notice of appeal, we took into consideration the fact that Judge Phillips lives and works in Clintwood, Virginia, which is located some distance from Grundy, Virginia, the site of the Clerk of the Court for Buchanan County. We knew it was Judge Phillips' custom and practice to mail documents from Clintwood for filing in Grundy. This meant that the date Judge Phillips signed the order could not be the same date the order was received and entered by the Clerk's office. We therefore understood that the date of the certificate by the Clerk's office – September 9 – was the date of entry of the judgment.

7. Accordingly, the notice of appeal stated on its face that the appeal was from a final judgment entered September 9.

8. Virginia Supreme Court Rule 5:9 provides, in pertinent part, "[n]o appeal shall be allowed unless, within 30 days after entry of final order or other appealable order or decree, counsel for the appellant files with the



Clerk of the trial court a notice of appeal. . . . " We therefore understood that our notice of appeal could be filed up to 30 days after September 9, or by October 9, 1986.

9. Mr. Farmer mailed the notice of the Clerk on Monday, October 6, 1986, and it was received October 7, 1986. Mr. Farmer also mailed a copy of the notice to the Commonwealth on that same date.

10. We never intended to bypass the state system, but attempted in every way possible to have the Virginia Supreme Court determine the questions on appeal on their merits. Toward that end, we filed a brief and reply brief on the merits, as well as reply and surreply briefs to the Commonwealth's motion to dismiss.

11. We had numerous conversations with counsel for the Commonwealth from the time we became state habeas counsel until the time the briefs in the Supreme Court were filed. In those conversations, we repeatedly affirmed what the Commonwealth knew all along: that Roger Coleman, if unsuccessful at the state trial level, would appeal to the Virginia and United States Supreme Courts, and from there, if necessary, to the federal system.

/s/ David E. Green
David E. Green

/s/ L. Stevenson Parker
L. Stevenson Parker

SEAL
Sworn to me this
13th day of
July, 1988

/s/ Brenda Brauley Still
Notary Public
Brenda Brauley Still
Notary Public District of Columbia
My Commission Expires: illegible

(Certificate Of Service Omitted In Printing)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

(Caption Omitted In Printing)

CIVIL ACTION NUMBER 88-0125-A

ORDER

FILED DEC 06 88

In accordance with a Memorandum Opinion entered this date, the petition for habeas corpus is denied in its entirety.

Nothing further remaining to be done, this case is dismissed and stricken from the docket.

The Clerk is directed to send certified copies to counsel of record.

ENTER: This 6th day of December 1988.

/s/ Glen M. Williams
UNITED STATES
DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: /s/ A. Cook
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

(Caption Omitted In Printing)

CIVIL ACTION NUMBER 88-0125-a

## MEMORANDUM OPINION

Roger Keith Coleman ("Coleman") was convicted of the rape and capital murder of Wanda McCoy in Buchanan County, Virginia. For the rape conviction, punishment was fixed at life imprisonment and on a separate hearing on the issue of punishment for the capital murder conviction, a sentence of death was imposed. The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). A writ of certiorari was denied by the United States Supreme Court. 46 U.S. 1109 (1984). On April 26, 1984, Coleman filed a petition for a writ of habeas corpus in the Buchanan County Circuit Court. An evidentiary hearing was conducted and a letter opinion dated June 23, 1986 rejected Coleman's claims. The Order in accordance with the letter opinion was signed on September 4, 1986. Coleman filed a notice of appeal on October 7, 1986 and subsequent thereto, filed a motion to correct the date of entry of judgment in the Circuit Court. Coleman requested in the motion that the Circuit Court correct the date of final judgment from September 4, 1986 to September 9, 1986. This motion was denied and on December 3, 1986 Coleman filed a petition for appeal in the Virginia Supreme Court. A motion to dismiss the appeal was filed on the grounds that the notice of appeal had not been filed in a timely manner. The Virginia Supreme Court granted the motion to dismiss by Order dated May 19, 1987 and subsequently denied a petition for a rehearing on June 12, 1987. On September 10, 1987, Coleman filed a petition for a writ of certiorari in the United States Supreme Court, which



petition was denied on October 19, 1987. *Coleman v. Bass*, 108 S.Ct. 269 (1987).

Coleman now files this complaint challenging the validity of his convictions and death sentence, raising the following claims:

A. AT LEAST ONE MEMBER OF THE JURY, GEORGE MARRS, FAILED TO DISCLOSE HIS PRECONCEIVED OPINION OF COLEMAN'S GUILT.

B. COLEMAN WAS NOT AFFORDED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

C. COMMUNITY PREJUDICE SO INFECTED THE TRIAL AS TO DEPRIVE COLEMAN OF AN IMPARTIAL JURY AND DUE PROCESS OF LAW.

D JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

E. THE PROSECUTION FAILED TO DISCLOSE EXCULPATORY EVIDENCE.

F. THE PROSECUTION'S CLOSING ARGUMENT DENIED COLEMAN A FAIR TRIAL.

G. THE JURY INSTRUCTIONS AT THE PENALTY STAGE WERE CONSTITUTIONALLY INADEQUATE.

H. THE ADMISSION OF PHOTOGRAPHS DENIED COLEMAN A FAIR TRIAL.

I. EVIDENCE OBTAINED IN VIOLATION OF *MIRANDA* WAS IMPROPERLY ADMITTED.

J. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.

## K. VIRGINIA'S CAPITAL MURDER STATUTE AND SENTENCING PROCEDURES ARE UNCONSTITUTIONAL FACIALLY AND AS APPLIED, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Claims C, H, I, and J were raised by Coleman in his direct appeal from his conviction to the Supreme Court of Virginia. Claims A, B, D, E, F, G, and K were raised by Coleman in the state habeas petition and therefore, the petitioner has exhausted state remedies on all of the issues raised in this case. Defendant has filed a motion to dismiss all of Coleman's claims. The matter has been thoroughly briefed and has been orally argued and is now ripe for decision.

The defendant contends that claims A, B, D, E, F, G and K which were not raised on direct appeal, but were subsequently raised in the state habeas proceedings are barred from federal review because Coleman failed to perfect an appeal to the Supreme Court of Virginia. Rule 5:9 (a), Rules of the Supreme Court of Virginia, provides that a notice of appeal must be filed with the clerk of the trial court within thirty days after entry of final judgment. The time limit cannot be extended. Rule 5:5 (a). The Order dismissing the habeas petition was signed by the Circuit Court Judge on September 4, 1986 and so states on its face. Actually, the evidence shows that Coleman's counsel had known since June 23, 1986 the decision of the Circuit Court Judge in the letter mailed to the parties. Coleman did not file his notice of appeal until thirty-three days after entry of judgment. Coleman sought the court to change the date of the state court Order on the theory that the entry of judgment did not occur until the



Clerk of Buchanan County Circuit Court had actually filed the same.

The Supreme Court of Virginia has held that Rule 5:9 (a) is mandatory. *Vaughan v. Vaughan*, 215 Va. 328, 210 S.E.2d 140 (1974). Coleman, having failed to follow the required state procedural rule, has procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72 (1977). *Sykes* applies to capital and non-capital cases. *Smith v. Murray*, 477 U.S. 527, 538 (1986). It is argued, however, that the blame for the procedural fault rested upon the habeas attorneys and that the petitioner has just cause not to be bound by the procedural error. The right to effective assistance of counsel is not required as a constitutional right in state habeas proceedings, *Evitts v. Lucy*, 469 U.S. 387 (1985). Since there is no constitutional right to counsel during state habeas proceedings, there is no constitutional right to effective assistance of counsel at that stage. *Whitley v. Muncey*, 823 F.2d 55 (4th Cir. 1987), *cert. denied*, 107 S.Ct. 3279 (1987). A state court dismissal of appeal because a notice is filed one day late does not deny due process. *Wainwright v. Torna*, 455 U.S. 586 (1982). This court accordingly finds that Coleman defaulted by failing to perfect his habeas appeal in the Virginia Supreme Court in a timely manner. However, in view of the gravity of this case, the court will proceed to analyze the various claims made by Coleman.

Coleman also contends that the state court, upon hearing his habeas proceeding, failed to make credibility findings on matters which were in dispute and also desires an additional evidentiary hearing to present additional evidence which was not presented in the state court. The court has reviewed the record in the state court

proceedings and finds that the state Circuit Court Judge, hearing the case, did make specific evidentiary findings of credibility and to allow Coleman to present again this same matter before this court is to have this court to consider whether it would make the same credibility finding that was made by the state court. Coleman was represented by counsel, was given a fair opportunity to present any evidence that he wanted to and the court proceeded to rule on all the matters that were presented to it. Therefore, the court is of the opinion that, since there was an adequate hearing given to Coleman on the state level, it is improper to conduct another hearing in this court.

**A. WAS JUROR MARRS PREJUDICED AGAINST THE DEFENDANT IN SUCH A WAY THAT HE SHOULD NOT HAVE BEEN A JUROR AND DID HE FAIL TO DISCLOSE THIS FACT ON VOIR DIRE?**

At the state evidentiary hearing, Coleman presented the evidence of Texas and Opal Rash who were first cousins of a juror by the name of George Marrs. These two witnesses testified that some time prior to Coleman's trial, Marrs had expressed to them a desire to serve on Coleman's case and also expressed an opinion that Coleman was guilty. They also presented evidence that Marrs stated that he "wanted to help burn the s.o.b." George Marrs appeared and testified as a witness and categorically denied any such conversation with the Rashes and denied that he made any statements attributed to him and denied that he was prejudiced in any way at Coleman's trial.



In a letter opinion dated June 23, 1986, the state habeas court recited the Rashes' testimony and found that the issue was one of credibility. The court then concluded that "the testimony of George Marrs was not biased and was credible." This court must presume that this finding that Marrs' testimony was credible is correct. 28 U.S.C. § 2254(d), *Summer v. Mata*, 455 U.S. 591, 592 (1982); *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

In conjunction with the claim that Marrs was an improper juror, Coleman also contends that he was denied the opportunity to question Marrs concerning whether or not he knew that Coleman had been convicted of a prior felony, of attempted rape, and that such knowledge was a significant factor in the jury's deliberations at the guilt stage of the trial. Nowhere in the petition for a writ of habeas corpus did Coleman allege that the jury had been improperly influenced during deliberations by knowledge of Coleman's prior record. There is nothing in the state court's decision whereby it purported to decide such a claim. Since Coleman did not raise this claim in his state petition he cannot raise it now. *Whitley v. Bair*, 802 F.2d 1487, 1500 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1618 (1987). Even if procedural default were not involved, the evidence Coleman sought to have admitted is inadmissible. The Federal Rules of Evidence provide that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith . . . " Fed. R. Ev. § 606(b). It would

contravene this rule to allow Marrs to testify to his and other jurors' states of mind during their deliberations.

## B. INEFFECTIVE ASSISTANCE OF COUNSEL

Coleman advances several instances which he alleges constitute ineffective assistance of counsel. Coleman must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

Coleman's first allegation of ineffective assistance of counsel is that "[c]ounsel failed to provide effective assistance with respect to Coleman's motion for a change of venue based on prejudicial publicity and community prejudice . . . . " The record shows that his attorney did present five newspaper articles and the testimony of Coleman's father and also attempted to enlist the assistance of other members of Coleman's family. Therefore, there was evidence presented on behalf of Coleman in order to obtain a change of venue. Trial counsel, however, was of the opinion based upon his experience in the county, that he could get a fair trial in Buchanan County and that under existing law, it would be necessary for them to show that he could not get a fair trial during the jury selection process. Therefore, counsel conducted an extensive voir dire which consumes more than two hundred and fifty pages of the transcript. While, in hindsight, it may appear that counsel could have done more on the change of venue, this court is of the opinion that the attorney did an excellent job of pursuing this matter and cannot be second-guessed.



Coleman contends that his counsel conducted a constitutionally ineffective voir dire concerning juror attitudes toward the death penalty and exposure to pretrial publicity. During voir dire eight jurors were excluded for cause, without objection, because they indicated they could not impose the death penalty. Coleman's counsel did not attempt to rehabilitate these witnesses. The court does not find that counsel's failure to rehabilitate constitutes ineffective assistance. Counsel knew the jurors were excludable for cause. *Lockhart v. McKee*, ___ U.S. ___, 106 S.Ct. 1758 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). With respect to voir dire concerning exposure to pretrial publicity, the court has already noted counsel's "extensive and searching voir dire." The court concludes that Coleman was adequately assisted by counsel during jury voir dire.

Coleman also contends that during the guilt stage, preparation was inadequate. However, this court agrees with the state Circuit Judge who tried the habeas case that trial counsel did adequately investigate, prepare for and present the case at the guilt stage and that they had an excellent understanding and knowledge of the facts of the case. This court agrees with the findings of the state habeas court that counsel's cross-examinations of the prosecution's witnesses showed an excellent understanding and knowledge of the facts of the case. An expert attorney called by the plaintiff at the habeas hearing found that the cross-examination was "a good job." Coleman claims that he was prejudiced because his counsel did not personally interview Roger Matney and also contends that they failed to interview certain prosecution witnesses. Coleman did not produce any evidence at the

state habeas hearing and he has not proffered any to this point as to any witnesses that were not interviewed and the court is of the opinion that the failure to interview personally Roger Matney is speculative as to any possible prejudice.

Coleman contends that his attorneys failed to file appropriate motions. More specifically, he contends that counsel should have filed a discovery motion requesting Phillip Van Dyke's time card. The crime for which Coleman was convicted occurred at 11:00 p.m. Coleman spoke with Van Dyke from 10:25 to 10:30 p.m. on the evening in question. When Van Dyke left Coleman, he proceeded directly to work and "punched in" at 10:41 p.m. This conversation with Van Dyke constituted a link in the chain of Coleman's alibi defense. Van Dyke's time card was not introduced at trial; however, Van Dyke testified that he punched in at 10:41 p.m. and his testimony was not disputed. The court fails to see how this constitutes deficient performance on the part of defense counsel. Although the time card was not introduced there certainly was evidence introduced as to the time of the Coleman-Van Dyke conversation.

Coleman also contends that his counsel were ineffective because they failed to object to the argument presented by the prosecution. The court has reviewed the arguments submitted by the prosecution and is of the opinion that any failure to object was simply a matter of strategy on the part of counsel. Attorneys are generally reluctant to object to argument where the objection will merely highlight the objectionable information. This trial tactic does not constitute ineffective assistance of counsel.



Coleman also contends that there was inadequate preparation and presentation of evidence at the penalty stage of his trial. Upon a review of the record, the court is of the opinion that counsel properly prepared Coleman for the penalty proceeding and requested Coleman to give them the names of witnesses but Coleman did not provide any. It was the testimony of trial counsel that Coleman told them that he didn't want any witnesses and didn't want anybody at the penalty stage of the hearing. Counsel received no help from the friends and relatives of Coleman. Such witnesses as were called were witnesses that were found and deemed to be relevant by counsel and not as a result of any help that they received from Coleman or his family. Coleman also contends that improper instructions were given at the penalty stage of the hearing. The court has examined these instructions and finds that they are grounded in Virginia law. Certainly counsel cannot be deemed ineffective for failing to object when the instructions accurately state Virginia law.

Coleman also contends that he was given ineffective assistance of counsel on direct appeal. However, Coleman's attorneys raised a total of seven issues before the Virginia Supreme Court, all of which had been properly preserved for appeal and all of which were decided by the Virginia Supreme Court. The court is of the opinion that counsel proceeded properly.

### C. DID THE STATE TRIAL COURT IMPROPERLY DENY COLEMAN'S MOTION FOR CHANGE OF VENUE?

Coleman contends that the state trial court improperly denied his motion for change of venue or venire. The

Virginia Supreme Court specifically found that the trial court "had no difficulty in impaneling a jury free from bias." *Coleman v. Commonwealth*, 226 Va. 31, 45, 307 S.E.2d 864-872 (1983). Under 28 U.S.C. § 2254(d) this court must afford a presumption of correctness to the state court finding that the jurors were fair and impartial. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Summer v. Mata*, 449 U.S. 539 (1981). The record indicates that the trial court was extremely careful to assure that a fair and impartial jury was impaneled. Coleman conducted extensive individual voir dire. No juror was seated over Coleman's objection. The court concludes that the jury was fair and impartial and the trial court did not err in denying Coleman's motion for a change of venue or venire.

## D. EXCLUSION OF JURORS WHO OPPOSED DEATH PENALTY

At the trial, eight jurors were excluded for cause because they opposed the death penalty. Coleman now contends that this was prejudicial error. Coleman did not raise this issue at trial or on appeal. The state habeas court determined that Coleman was barred by Virginia law from raising the claim in his state habeas petition. *Slayton v. Perrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). The United States Supreme Court has held that "absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver" federal habeas review is barred. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1976). Coleman has alleged no cause for his failure to raise this claim. This court, therefore, is barred from reviewing it.



## E. DID THE COURT COMMIT DISCOVERY VIOLATIONS BY FAILURE TO OBTAIN EXCULPATORY EVIDENCE ON BEHALF OF COLEMAN?

Coleman alleges that the Commonwealth denied his due process rights by failing to provide Coleman with several items of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1962). The *Brady* case "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment' " *United States v. Bagley*, 473 U.S. 667, 675 (1984). The *Bagley* case defined materiality as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

*Id.* at 682.

Coleman alleges the prosecution failed to disclose four items of exculpatory evidence: notes police took when interviewing Coleman's wife, Van Dyke's "time card," the crime scene report and Sandra Stiltner's statement. The court concludes these items of evidence were disclosed to Coleman. These items of evidence were in the prosecution's file. At the state habeas hearing Coleman's trial attorneys testified that they had full access to the prosecution's entire file. Therefore, the court concludes the prosecution did comply with *Brady v. Maryland*.

Even if the prosecution had not disclosed the material evidence, there was no due process violation. Coleman alleges that his wife told police he had arrived at

home at 11:05 p.m. She had, however, also told both police and defense counsel that Coleman had arrived at home at 11:30 p.m. There is no reasonable probability that police notes that indicated she once put 11:05 p.m. as the time of Coleman's arrival at home would have changed the outcome of the trial. As to the Van Dyke "time card," Van Dyke testified as to all of the relevant information on his time card. Disclosure of the time card would not have changed the outcome of the trial nor is it probable that the crime scene report would have changed the trial. It indicates that there was a mark made with very little pressure on the door to the victim's home. It is not probable that this would have affected the outcome of the trial given the fact that the victim's husband and the police chief testified that there was no sign of forced entry into the house. Finally, Coleman alleges that a statement made by Sandra Stiltner indicated Coleman came by her trailer between 10:00 and 10:30 on the night in question. At trial Ms. Stiltner testified Coleman could have left as late as 10:25 p.m. There is no reasonable probability, therefore, that the disclosure of Ms. Stiltner's statement would have affected the outcome of the trial.

## F. IMPROPER PROSECUTORIAL ARGUMENT

The state habeas court found that all of the claims regarding prosecutorial argument were procedurally defaulted because they had not been raised at trial nor on appeal citing *Slayton v. Perrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). This court is of the opinion that this matter has been double-defaulted in that it was not raised at trial nor



was it raised on appeal and it was further procedurally defaulted in the appeal of the habeas proceedings.

## G. CONSTITUTIONAL ADEQUACY OF THE PENALTY STAGE INSTRUCTIONS

The state habeas court ruled that the claim was barred from habeas by Coleman's procedural default. The court is of the opinion that this is correct and the claim was again defaulted when Coleman failed to perfect an appeal of the habeas proceeding. This court has further reviewed the instructions however in the light of *James Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984) and the court finds that the penalty stage instructions at Coleman's trial satisfy the *Briley* standard.

## H. SHOULD PHOTOGRAPHS OF THE VICTIM'S BODY FOUND AT THE SCENE OF THE CRIME HAVE BEEN ADMITTED INTO EVIDENCE?

Federal courts do not sit to review state evidentiary questions. *Lisenba v. California*, 314 U.S. 219 (1941). Unless there is something fundamentally unfair so as to make a constitutional issue of the same, generally this court is bound by the evidentiary findings of the state court. There is no contention that the photographs do not accurately depict what they purport to depict and such matters are and should be left to the discretion of the trial judge. The Virginia Supreme Court has found that the photographs were relevant and material under the facts of the case and this court is certainly required to give due deference to this finding by the state Supreme Court.

## I. DID THE STATE COURT CORRECTLY REJECT COLEMAN'S *MIRANDA* CLAIM?

Coleman's [sic] argues that the trial court admitted two statements the police obtained from him in violation of *Miranda*. The state habeas court found the interrogatories to be noncustodial. This finding is entitled to a presumption of correctness. The interview of Coleman took place in a police officer's vehicle parked outside Coleman's house. At the trial, the officer testified that Coleman was free to leave. Coleman was not arrested until a month after this interview. Thus this court must concur with the state habeas court that there was no custodial interrogation.

## J. WAS THE EVIDENCE SUFFICIENT TO SHOW COLEMAN'S GUILT BEYOND A REASONABLE DOUBT?

Coleman argues that the evidence was insufficient to support the jury's verdict. In determining this issue, this court must view the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). The Virginia Supreme Court in reviewing this issue followed a stricter standard. The Virginia court followed the rule that circumstantial evidence must be "sufficiently convincing to exclude any reasonable hypothesis except that of guilt." *Coleman v. Commonwealth*, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983). If the evidence is sufficient to meet the Virginia standard, then *a fortiori* it is sufficient to meet the lesser *Jackson*



standard. *Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 104 (1985). The court finds that there was sufficient evidence to support the jury's verdict. There is a wealth of circumstantial evidence in this case in addition to evidence that Coleman admitted to Roger Matney that he had participated in the rape-murder. Clearly, there was sufficient evidence in this case to go to the jury and there is sufficient evidence under the *Jackson* standard to sustain this conviction.

## K. CONSTITUTIONALITY OF VIRGINIA'S DEATH PENALTY STATUTE

The state habeas court held that Coleman had procedurally defaulted with respect to his claim that Virginia's death penalty statute is unconstitutional because he failed to raise the claim at trial or on dire court appeal. *See, Slayton v. Perrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). As noted earlier, in the absence of both cause and prejudice, federal habeas review is barred where there is a state procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Clanton v. Muncy*, 845 F.2d 1238 (4th Cir. 1988). Coleman has alleged neither cause for his default nor prejudiced [sic] from his default; therefore, it is not appropriate for this court to review this particular claim.

## CONCLUSION

The court having found on the merits that there was no denial of any constitutional rights of Coleman in his trial and the various appeals and other hearings related thereto, the court is of the opinion that this petition for

habeas corpus shall be denied in its entirety and an Order will entered [sic] to that effect.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 6 day of December 1988.

/s/ Glen M. Williams
UNITED STATES
DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 89-4002

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ROGER K. COLEMAN

Petitioner - Appellant

v.

CHARLES THOMPSON, Warden

Respondent - Appellee

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Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, Senior District Judge. (CA-88-125-A)

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Argued: October 2, 1989 Decided: January 31, 1990

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Before CHAPMAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

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BUTZNER, Senior Circuit Judge:

Roger Keith Coleman, a Virginia prisoner sentenced to death, appeals the district court's denial of his petition for a writ of habeas corpus. The district court concluded that Coleman's claims were procedurally defaulted. We affirm.

Coleman was convicted on March 18, 1982, in the Circuit Court of Buchanan County, Virginia, of rape and capital murder. The opinion affirming his conviction recounts the facts about the crime and the evidence introduced for the imposition of a death sentence. *See Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109 (1984). Coleman then applied for a writ of habeas corpus in the Circuit Court of Buchanan County. After an evidentiary hearing, the court denied the writ. The Supreme Court granted the state's motion to dismiss Coleman's appeal. Again, the Supreme Court denied certiorari. *Coleman v. Bass*, 484 U.S. 918 (1987). Coleman next petitioned for a writ of habeas corpus in the federal district court, setting forth 11 claims asserting the invalidity of his conviction and sentence. The district court denied relief without an evidentiary hearing, and this appeal followed.

I

In his brief, Coleman states the first issue on appeal as follows:

> Did the District Court err in finding that federal review of Coleman's claims is barred: (a) when dismissal by the Virginia Supreme Court was based on the novel reading of an ambiguous procedural rule, (b) when Coleman's late filing of his notice of appeal did not represent a deliberate bypass of the courts, and (c) when application of procedural default rules to counsel's error in filing the appeal one day late would deny Coleman meaningful access to the courts?



The district court found that the Virginia Supreme Court had dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Consequently, the district court dismissed as procedurally defaulted the following seven claims, which were raised only in the state habeas proceeding and not on direct appeal:

> At least one member of the jury, George Marrs, failed to disclose his preconceived opinion of Coleman's guilt.
>
> Coleman was not afforded reasonably effective assistance of counsel.
>
> Jurors were improperly excluded because of their opposition to imposition of the death penalty.
>
> The prosecution failed to disclose exculpatory evidence.
>
> The prosecution's closing argument denied Coleman a fair trial.
>
> The jury instructions at the penalty stage were constitutionally inadequate.
>
> Virginia's capital murder statute and sentencing procedures are unconstitutional facially and as applied, under the Eighth and Fourteenth Amendments to the Constitution of the United States.

A

The district court premised its finding of procedural default on the Virginia Supreme Court order which dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Rule 5:9(a) of the Virginia Supreme Court provides:

> No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

The state habeas court entered its order denying a writ of habeas corpus on September 4, 1986. Coleman filed his notice of appeal on October 7, 1986, one day late, counting from September 5 and omitting Saturday and Sunday, October 4 and 5. Va. Code Ann. §§ 1-13.3 and 1-13.3:1 (1987). Two weeks later Coleman moved the state habeas court to correct the date of final judgment from September 4 to the date the clerk recorded the order in the common law order book, September 9. The court denied the motion, stating in its order "final judgment was entered on September 4, 1986."

On December 4, 1986, Coleman filed a petition for appeal in the Virginia Supreme Court. The state responded by moving to dismiss the petition on the sole ground that Coleman had filed his notice of appeal more than 30 days after the entry of final judgment. Both sides then briefed the motion and the merits of the petition. The Supreme Court ruled: "[T]he motion to dismiss is granted and the petition for appeal is dismissed."

A state habeas petitioner who fails to meet the requirements of state procedural law, and who has his petition dismissed on that basis by the last state court to review it, loses federal review of the federal claims raised in the state petition in the absence of cause and prejudice or a fundamental miscarriage of justice. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478



(1986). Procedural default can be invoked by the state only when "the state court's opinion contains a 'plain statement that [its] decision rests upon adequate and independent state grounds.'" *Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989) (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)).

Coleman argues that the Virginia Supreme Court did not clearly and expressly rely on a state procedural rule in dismissing his petition for appeal. He points to the Court's recital that among other papers it considered the briefs that had been filed in opposition to the petition.

Coleman's argument lacks a factual basis. The Supreme Court complied with the "plain statement" rule that *Harris* made applicable to habeas corpus proceedings. The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal. The Court recites that it considered all of the papers filed by the parties. The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.[1]

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[1] The order states:

> On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.
>
> Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a

(Continued on following page)

The district court properly concluded that the failure to comply with Rule 5:9(a) was an adequate ground to apply the bar of procedural default. The rule is mandatory. *Vaughan v. Vaughan*, 215 Va. 328, 210 S.E.2d 140 (1974). The mandatory nature of the rule does not make it unconstitutional. Dismissal of an application for discretionary review because it is untimely does not deprive the applicant of due process of law. *Wainwright v. Torna*, 455 U.S. 586, 588 n.4 (1982). Even in a capital case, procedural default justifies a federal habeas court's refusal to address the merits of the defaulted claims. *Smith v. Murray*, 477 U.S. 527 (1986).

B

Coleman asserts that the district court erred because the dismissal by the Virginia Supreme Court was based on a novel reading of an ambiguous procedural rule, namely, whether an order is "entered" on the date the judge issues it or the date the clerk records it. He relies on the proposition that a procedural ground is inadequate if

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(Continued from previous page)

reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.



it fails to provide fair notice to the litigant. *See, e.g., James v. Kentucky*, 466 U.S. 341 (1984).

The major premise of Coleman's argument is flawed. The rule is not ambiguous. Its application by the Supreme Court was not novel. Notice to Coleman was adequate. The final order of the state habeas court contains the following notation immediately above the judge's signature: "Entered this 4th day of September 1986." Virginia case law giving effect to the judge's notation of entry is clear. In *Peyton v. Ellyson*, 207 Va. 423, 430-31, 150 S.E.2d 104, 110 (1966), the Court held that the final order denying a petition for writ of habeas corpus was entered on the date the judge signed the order and that the time for appeal started running from that date.

C

Coleman next argues that the rule of procedural default is inapplicable because his late filing did not represent a deliberate bypass of the courts. He relies on *Fay v. Noia*, 372 U.S. 391 (1963), and its progeny, *Ferguson v. Boyd*, 566 F.2d 873 (4th Cir. 1977).

*Murray v. Carrier* forecloses Coleman's reliance on *Fay* and *Ferguson* by holding that whether procedural default in appellate proceedings bars federal consideration of the defaulted claims should be determined by the cause and prejudice standards of *Wainwright v. Sykes*, and not by the deliberate bypass standard of *Fay*. 477 U.S. at 485-92. *See also Smith v. Murray*, 477 U.S. at 533. In *Murray v. Carrier*, the Court noted that it expressed no opinion concerning application of the deliberate bypass standard to decision of counsel "not to take an appeal at all." 477

U.S. at 492. But this reservation need not detain us, because Coleman's counsel decided to take an appeal.

D

A prisoner can avoid the bar of procedural default if he can show "cause for the noncompliance" with state law and "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. at 84. Coleman assigns as cause his counsel's error in failing to file a timely notice of appeal from the final order of the state habeas court. The error, he asserts, is of sufficient magnitude to constitute ineffective assistance of counsel that denied him access to the courts. He relies on *Murray v. Carrier*, 477 U.S. at 489, where the Court discussed the circumstances which would justify treating error of counsel as cause.

Coleman's reliance on *Murray v. Carrier* is misplaced. There the Court was discussing error arising out of a direct appeal in which a prisoner has a right to counsel whose performance is not constitutionally ineffective. In contrast, the error in Coleman's case occurred in state habeas corpus proceedings. The difference in the proceedings is significant, for a state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel. *Murray v. Giarratano*, 109 S. Ct. 2765 (1989).

*Wainwright v. Torna* rejects a claim that is essentially similar to Coleman's. In *Torna*, a prisoner's counsel filed an application for discretionary review in the state Supreme Court one day late. The prisoner charged that this error denied him effective assistance of counsel. The



Supreme Court held: "Since [the prisoner] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." 455 U.S. at 587-88. Because Coleman, like Torna, had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel. Thus, he cannot show "cause" by showing ineffective assistance of counsel. *But see Madyun v. Young*, 852 F.2d 1029, 1033 n.2 (7th Cir. 1988) (dictum).

E

A prisoner may also avoid the bar of procedural default by demonstrating that denial of federal review will result in a fundamental miscarriage of justice. *Harris v. Reed*, 109 S. Ct. at 1043; *Smith v. Murray*, 477 U.S. at 537; *Murray v. Carrier*, 477 U.S. at 495. This avenue of relief, however, is limited to "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. at 496. This principle does not entitle Coleman to avoid the bar of his procedural default.

The district court found that the evidence was sufficient to show Coleman's guilt beyond a reasonable doubt. The evidence included Coleman's admission that he participated in the crimes. Hair, blood, and semen typing indicated that Coleman raped the victim. *See Coleman v. Commonwealth*, 226 Va. at 52-53, 307 S.E.2d at 876. Proof of Coleman's conviction for the attempted rape of another person several years earlier and the manner in which he killed his victim in the case were aggravating factors that

the jury could consider in imposing the death sentence. *See* 226 Va. at 53-55, 307 S.E.2d at 876-77.

In sum, we conclude that the district court did not err by ruling that the failure by Coleman's counsel to file a timely notice of appeal from the final order of the state habeas court constituted a procedural default barring federal review of the claims asserted only in the state habeas corpus proceeding.

II

The second issue raised by Coleman is as follows:

> Did the District Court err in dismissing Coleman's petition without first holding an evidentiary hearing even though material factual disputes raised in collateral review proceedings before the Commonwealth courts had not been resolved?

Coleman asserts that the state court did not resolve factual disputes pertaining to his claim that one of the jurors, George Marrs, was biased against him. He also contends disputed issues of fact remain with respect to his claim of ineffective assistance of counsel.

Neither the complaint about the juror nor the claim of ineffective assistance of counsel was raised on direct appeal. Therefore, Coleman's procedural default in failing to file a timely notice of appeal of the state court's final judgment denying his petition for a writ of habeas corpus bars his review in federal court. Consequently, an evidentiary hearing was unnecessary.



III

The district court held that Coleman's next three issues were also barred by procedural default. Nevertheless, it alternatively considered Coleman's claims and found them to be without merit. In addition to his general denial of procedural default, Coleman assigns error to the district court's alternative disposition of his claims for lack of merit. He raises the following issues:

> Did the District Court err in finding that Coleman was not convicted by a biased jury even though evidence presented in the collateral review proceedings in the Commonwealth courts demonstrated that one of the jurors had, before trial, expressed his desire to be on the jury so he could help "burn" Coleman?
>
> Did the District Court err in finding that Coleman was effectively represented by counsel when the evidence demonstrates that the representation Coleman received, from the change of venue motion, through trial preparation and the sentencing proceeding, was grossly deficient and prejudiced Coleman?
>
> Did the District Court err in finding that the Commonwealth satisfied due process discovery requirements even though it failed to produce to Coleman evidence which supported Coleman's alibi and undermined the prosecution's theory of the case?

None of the claims mentioned in these issues was raised on direct appeal. The state habeas court found that they lacked merit, and the Virginia Supreme Court denied discretionary review because Coleman's notice of appeal was untimely.

The district court properly sustained the state's position that Coleman's procedural default barred federal review of all of these claims.

IV

Coleman asserts that the death penalty was unconstitutionally imposed for reasons that he states in the final issue that he raises on appeal:

> Did the District Court err in finding that the death penalty was constitutionally imposed on Coleman in spite of the fact that (a) the record cannot support the conclusion that the jury met the requirements of Virginia law by unanimously finding the existence of an aggravating circumstance, and (b) the jury was not provided with a constitutionally adequate limiting construction for Virginia's "outrageously or wantonly vile" aggravating circumstance?

Coleman made no objection in the trial court or on direct appeal to the errors he now assigns. As we have previously noted, Coleman did not perfect a timely appeal from the denial of his state habeas corpus petition. The state asserts, and the district court properly ruled, that federal review of Coleman's complaints about the constitutionality of the death sentence is barred by his procedural default at both the trial and habeas proceedings.

V

Quite apart from the propriety of the instructions in the penalty phase of the trial, the decision of the Virginia Supreme Court establishes that Coleman's sentence was



lawful. Neither the Sixth nor Eighth Amendment requires "a jury trial on the sentencing issue of life or death." *Hildwin v. Florida*, 109 S. Ct. 2055, 2056 (1989) (Sixth Amendment); *Cabana v. Bullock*, 474 U.S. 376, 384-88 (1986) (Eighth Amendment). State law may authorize a forum other than the jury to impose the death penalty. An appellate court is a constitutionally permissible forum. *Cabana*, 474 U.S. at 392.

*Cabana* dealt with an aggravating factor necessary for the imposition of the death penalty on one who aids and abets a felony in the course of which others commit a murder. *See Cabana*, 474 U.S. at 378. The Court held that, if authorized by state law, an appellate court can determine whether an aggravating factor has been proved and can impose the death penalty. The appellate court can exercise such power even when the jury may not have found an aggravating factor. 474 U.S. at 384-88. Under these circumstances a federal court should not confine its inquiry to the jury instructions. "Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made." 474 U.S. at 387. A federal court errs by "focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of [the aggravating factor] had been made by the trial court or by the state appellate court." 474 U.S. at 389. Although *Cabana* dealt with a specific categorical aggravating factor, the principles the Court explained are applicable to the determination of other aggravating factors in crimes committed under circumstances quite different from those

examined in *Cabana*. *See, e.g., Johnson v. Mississippi*, 108 S. Ct. 1981, 1989 (1988) (White, J., concurring). The major premise of *Cabana* – the Constitution does not require a jury for the imposition of the death penalty – is applicable to Coleman's case.

To apply *Cabana*' principles, a federal court must determine what authority state law confers on its appellate court with respect to the death penalty and then ascertain whether this authority has been constitutionally exercised. *Cf. Spazino v. Florida*, 468 U.S. 447, 457-64 (1984).

Virginia law confers broad powers on the Supreme Court. Va. Code Ann. § 17-110.1 (1988). Every sentence of death must be reviewed by the Court. This review may be consolidated with an appeal, if one is taken. In addition to errors "enumerated by appeal," the Court must consider other specific issues that address the fundamental fairness of the trial and sentence.[2] The statute vests in the Supreme Court extraordinary authority to commute the sentence of death to imprisonment for life. It may affirm the sentence of death or remand for new sentencing proceedings. In short, the only limitation on the Court's power is the authority to impose a death sentence when the trial court, with or without a jury, has imposed a lesser penalty.

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[2] There is no counterpart to this proceeding in the federal judicial system. Federal review of constitutional issues in death cases, unfettered by procedural bars, would promote fairness and reduce the delay and complexity that all too often mark the present system.



In Coleman's case, the Virginia Supreme Court exercised the power conferred on it by § 17-110.1. It compared Coleman's case to others "where the death sentence was based upon the dangerousness of the defendant and the vileness of the crime."[3] *Coleman v. Commonwealth*, 226 Va. at 54, 307 S.E.2d at 877. Justifying the application of these statutory aggravating factors, it recounted that "Colemar., who had previously been convicted of attempted rape, raped his victim, cut her throat, dragged her through her house, and stabbed her twice at or after her death." 226 Va. at 55, 307 S.E.2d at 877. The Court cited as a somewhat analogous case *Smith v. Commonwealth*, in which it constitutionally limited the statutory vileness factor by defining " 'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). The Court stated

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[3] Va. Code Ann. § 19.2-264.4C (1983) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall provide beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

We have upheld the constitutionality of the statute as narrowed by *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). *See Turner v. Bass*, 753 F.2d 342, 353 (1985).

that it had "independently determined that the sentence of death was properly imposed," and it "decline[d] to commute the sentence." 226 Va. at 55, 307 S.E.2d at 877.

In *Maynard v. Cartwright*, 108 S. Ct. 1853, 1858 (1988), the Court explained:

> Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

The Virginia Supreme Court's review of the sentence satisfies this constitutional requirement.

Finding no constitutional infirmity that is cognizable on federal review, we affirm the judgment of the district court denying a writ of habeas corpus.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 89-4002
(Caption Omitted In Printing)

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On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Chapman and Judge Merhige.

Filed: February 27, 1990

For the Court,

JOHN M. GREACEN
CLERK

---

SUPREME COURT OF THE UNITED STATES

No. 89-7662

Robert Keith Coleman,

Petitioner

v.

Charles E. Thompson, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 2, 3 and 4 presented by the petition.

October 29, 1990

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No. 89-7662

In The

# Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

*Petitioner,*

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Does a state court's summary order satisfy the plain statement rule of *Harris v. Reed*, 489 U.S. 255 (1989), if it refers to the federal merits and does not make clear that a state procedural ground is an independent basis for decision?

2. Does the failure of post-conviction counsel to file a timely notice of appeal constitute cause to excuse the resulting procedural default that would otherwise bar federal habeas relief?

3. Should *Fay v. Noia*, 372 U.S. 391 (1963), be applied to relieve a state prisoner of a procedural default resulting from counsel's unauthorized failure to take a timely appeal?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of petitioner's federal petition for a writ of habeas corpus, reported at 895 F.2d 139 (4th Cir. 1990), and the order of the Court of Appeals denying petitioner's application for rehearing and rehearing *en banc*, reported at 1990 U.S. App. Lexis 3189 (4th Cir. Feb. 27, 1990), are reproduced in the Joint Appendix at 53 to 69. The opinion of the United States District Court for the Western District of Virginia, issued on December 6, 1988, is reproduced in the Joint Appendix ("JA") at 35 to 52.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of petitioner's habeas corpus petition under 28 U.S.C. § 2254 was entered on January 31, 1990. The Court of Appeals denied the petition for rehearing and rehearing *en banc* on February 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 28 U.S.C. § 2254(a)-(c):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment

of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

## STATEMENT OF THE CASE

On March 18, 1982, petitioner Roger Keith Coleman was convicted in the Circuit Court for Buchanan County, Virginia, of the rape and the murder of his sister-in-law, Wanda Fay McCoy. On the following day, the jury fixed Coleman's punishment at death. The court imposed the sentence of death on April 23, 1982. The Virginia Supreme Court affirmed the conviction and sentence on September 4, 1983. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). Coleman's petition for a writ of certiorari was denied by the Court on March 19, 1984. 465 U.S. 1109 (1984).

On April 26, 1984, Coleman filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan



County and amended that petition on September 7, 1984. (Joint Appendix for *Coleman v. Thompson*, United States Court of Appeals for the Fourth Circuit, 591-647.) ("Fourth Cir. App.") In November 1985, an evidentiary hearing was held in the Circuit Court before Judge Phillips. At the hearing, Coleman introduced evidence that before trial, one of the jurors had expressed a desire to sit on the jury so he could "help burn the S.O.B." (Fourth Cir. App. 680.) This evidence of juror bias did not come to light until well after Coleman's conviction and direct appeal.

Coleman also introduced evidence to demonstrate that he had not received effective representation from his trial counsel at any stage of the proceedings, commencing with the motion to change venue and concluding with the sentencing proceeding. Most notably, trial counsel failed to investigate and introduce evidence in support of Coleman's alibi defense and to take other steps to support Coleman's steadfast insistence on his innocence. Counsel failed to interview and to prepare for the cross-examination of a jailhouse informant. Furthermore, counsel failed to cross-examine effectively the prosecution's forensic expert whose testimony was the only link between Coleman and the crime. (Fourth Cir. App. 649-946; 954-70.) Coleman also presented evidence demonstrating that the prosecution had withheld exculpatory materials within its possession. (Fourth Cir. App. 1143; 1046-48.)

On June 23, 1986, Circuit Judge Phillips issued a letter opinion indicating his intention to deny Coleman's petition and directing the Commonwealth's attorney to prepare a final order. (JA 3-15.) On September 4, 1986, Judge Phillips signed the final order, adopting verbatim

the proposed order submitted by the Commonwealth, including a number of findings not in the June 23 letter opinion.[1] (JA 16-19.) On September 9, 1986, the order was entered in the docket book for the Circuit Court of Buchanan County and mailed to Coleman's counsel. (Fourth Cir. App. 989-94.)

On October 6, 1986, Coleman's counsel sent a notice of appeal to the Circuit Court by first class mail. (JA 29, 33.) The notice was deemed filed when it was received in the clerk's office on October 7. Had the notice been sent by registered or certified mail, it would have been deemed filed upon dispatch rather than upon receipt. Va. Sup. Ct. Rule 5:5(b). Coleman's petition for appeal, which briefed the merits of his claims, was filed with the Virginia Supreme Court on December 4, 1986. (JA 25.)

On December 9, 1986, the Commonwealth filed a motion to dismiss the appeal on the ground that the appeal had been filed one day late when measured from the day on which Judge Phillips signed the order to the day on which the Circuit Court received the notice. (JA 22-24.) The Commonwealth asked the Virginia Supreme Court for an expedited decision on the motion to dismiss so that it would be unnecessary for it to brief the merits of the appeal. (JA 23-24.) The Virginia Supreme Court did not grant the Commonwealth's request and required full briefing of the merits.

---

[1] In denying Coleman's juror bias claim, the Circuit Court never determined whether the juror had stated that he wanted to be on the jury to help "burn" Coleman. The court instead relied solely upon the juror's voir dire testimony to the effect that he was unbiased. (JA 5-6.)



On May 19, 1987, four months after briefing on the merits was complete, the Virginia Supreme Court issued a summary order dismissing the appeal. The order listed all the briefs filed – including the merits' briefs – and concluded that "[u]pon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." (JA 25-26.) The order did not reveal the court's reasoning. Coleman's motion for rehearing was denied on June 12, 1987. (JA 27.) This Court denied Coleman's petition for a writ of certiorari on October 19, 1987. *Coleman v. Bass*, 484 U.S. 918 (1987).

On April 22, 1988, Coleman filed a federal habeas petition in the United States District Court for the Western District of Virginia. The Commonwealth moved to dismiss, asserting that the petition was without merit and that the Virginia Supreme Court's summary dismissal of Coleman's state habeas appeal constituted a procedural bar to the petition. The Commonwealth acknowledged that Coleman had exhausted his state remedies by appealing to the Virginia Supreme Court. Respondent's Brief in Support of Motion to Dismiss Federal Habeas Petition, dated May 16, 1988, at 4. Coleman argued the merits of his claims and sought an evidentiary hearing because the state habeas court had never ruled on certain factual issues critical to its legal conclusions. Coleman also argued that his claims were not procedurally barred because he had intended to appeal and his intentions were frustrated by his counsel. (JA 33, 39.) On December 6, 1988, the district court granted the motion to dismiss, ruling in the alternative that the federal constitutional claims raised by Coleman were defaulted and that his petition lacked merit. (JA 39, 51-52.)

The Fourth Circuit affirmed in an opinion issued January 31, 1990. *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990). (JA 53-68.) The Court of Appeals concluded that the Virginia Supreme Court's dismissal of petitioner's appeal procedurally barred his federal constitutional claims. The court declined to excuse the resulting procedural default under either *Wainwright v. Sykes*, 433 U.S. 72 (1977), or *Fay v. Noia*, 372 U.S. 391 (1963). 895 F.2d at 143-44. (JA 59-61.) Coleman's application for rehearing and rehearing *en banc* was denied on February 27, 1990. 1990 U.S. App. Lexis 3189. (JA 69.)

Coleman filed his petition for a writ of certiorari on May 29, 1990. The Court granted the petition on October 29, 1990, to consider three of the four questions stated in the petition, namely:

> Under *Harris v. Reed*, is it permissible for a federal court to analyze state law and the state court record to determine whether federal claims are barred by state procedural default?
>
> Should a federal court waive a procedural default resulting from post-conviction counsel's failure to file a timely appeal when the default would bar any hearing of the petitioner's constitutional claims?
>
> Does the deliberate bypass standard of *Fay v. Noia* continue to apply to a procedural default resulting from a failure to appeal at all?

## SUMMARY OF ARGUMENT

The Virginia Supreme Court's order dismissing Coleman's petition for appeal does not meet the requirements



of the plain statement rule of *Harris v. Reed*, 489 U.S. 255 (1989), and thus does not present a procedural bar to the hearing of Coleman's claims on federal habeas. The order is ambiguous because it expressly states that the court considered the briefs on the federal merits and does not state that the state's procedural rule was an independent basis for decision. The ambiguity is not simply hypothetical: the Virginia Supreme Court has in other cases considered the merits of federal constitutional claims to inform its decision whether or not to waive the application of its rules with respect to the time for filing an appeal; nothing in the order implies it did otherwise in Coleman's case. Accordingly, there is no basis for concluding that there was an independent state law ground for the dismissal that would bar federal habeas corpus review.

Even if the Court were to find that the Virginia Supreme Court's order rested on an independent state procedural ground, the state default should not preclude federal habeas relief. First, the late filing of the notice of appeal by Coleman's post-conviction counsel constitutes "cause" to excuse the procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Fourth Circuit misinterpreted *Murray v. Carrier*, 477 U.S. 478 (1986), when it ruled that post-conviction counsel's ineffectiveness could never be cause. The proper reading of *Carrier* is that an attorney's dereliction constitutes cause whenever it prevents a defendant from complying with a state's procedural rules and falls outside "the wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), regardless of whether that attorney's assistance is constitutionally mandated. Failure to excuse a procedural default resulting from ineffective

post-conviction counsel would remove the safeguard that effective representation provides against the improvident loss of federal constitutional claims.

Second, Coleman's failure to appeal was not a deliberate bypass of the orderly procedures of the Virginia courts and therefore should not bar federal habeas review. *Fay v. Noia*, 372 U.S. 391 (1963). The Court's opinions recognize that certain fundamental decisions, like the decision to appeal, can be made only by the petitioner. Coleman's desire to appeal is undisputed; consequently, the default resulting from his counsel's failure to file the notice of appeal in a timely manner should not bar federal review.

## ARGUMENT

### I.

### THE VIRGINIA SUPREME COURT'S ORDER IS NOT DEMONSTRABLY BASED ON A STATE PROCEDURAL RULE WHICH IS INDEPENDENT OF THE FEDERAL MERITS OF PETITIONER'S CLAIMS.

Under the plain statement rule of *Harris v. Reed*, 489 U.S. 255 (1989), a federal habeas court must presume that a state court reached the merits of a federal claim unless it is apparent from the face of the state court decision that there is an adequate and independent state procedural law basis for decision. If the presumption attaches, the federal claims must be heard in the federal habeas court.

In the present case, the Virginia court took briefs on the merits before considering the Commonwealth's motion to dismiss based on the timeliness of Coleman's



appeal. The order dismissing the petition for appeal states that the court considered the briefs on the federal merits as well as those on state law. The order does not state that the dismissal was independently based on a state procedural rule. There are thus two possibilities: *(1)* without considering petitioner's federal constitutional claims, the Virginia Supreme Court dismissed because it found the appeal barred as untimely; *(2)* it dismissed the appeal as untimely *because* it found the federal constitutional claims to be without merit.[2] If the latter occurred (and there is no basis for presuming that it did not), the state law ground for dismissal is not independent of federal law. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Under such circumstances, *Harris* requires that the federal court presume that the federal merits were reached, and there is no bar to federal habeas review.

#### A. The Virginia Supreme Court Order Does Not Contain A Plain Statement That It Is Based On An Independent State Ground.

On its face, the Virginia Supreme Court's summary order dismissing Coleman's habeas petition is ambiguous.[3] The order lists all the papers filed by the parties

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[2] While the Virginia Supreme Court's language in summarily denying petitions for appeal is not always precise, we do not contend that the Virginia Supreme Court misstated the basis for its decision and that the dismissal was directly on the federal merits. *Cf. Irvin v. Dowd*, 359 U.S. 394, 404 (1959).

[3] The complete order of the Virginia Supreme Court, reproduced at JA 25-26, reads as follows:

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– papers that include briefs on the merits – and states that, "[u]pon consideration whereof," the Commonwealth's motion is granted and the petition for appeal is dismissed. The order thus makes clear that the court considered both the federal merits of petitioner's claims and the state procedural grounds. The order does not explicate any basis for the dismissal and does not say that the Virginia court granted the motion to dismiss independently of any consideration of the federal claims.

The order does not mention procedural default or the fact that the notice of appeal was filed one day late. It does not refer to Virginia Supreme Court Rule 5:9 (the rule relied upon by the Fourth Circuit for its interpretation of the order)[4] or to *Saunders v. Reynolds*, 214 Va. 697,

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On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal [December 9, 1986]; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

[4] Rule 5:9(a) states: "No appeal shall be allowed unless, within 30 days after entry of final judgment or other

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204 S.E.2d 421 (1974) (which the Commonwealth asserts explains the Virginia Supreme Court's reasoning process in "dismissing" appeals). Nor does the order state that the appeal was being dismissed "for the reasons stated in the Commonwealth's motion to dismiss." *Cf. Harris*, 489 U.S. at 266.

The absence of a statement of reasons in the order is significant because the Virginia Supreme Court on occasion examines the merits of federal constitutional claims in order to decide whether or not to hear late-filed appeals. *See, e.g., O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 715, 152 S.E.2d 278, 284 (1967) (late appeal dismissed because plaintiff had not been denied any constitutional right), *cert. denied*, 389 U.S. 825 (1967); *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970).[5] In *O'Brien*, the

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appealable order or decree, counsel for the appellant filed with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel." The rule was enacted pursuant to an order of the Virginia Supreme Court.

In order to perfect an appeal to the Virginia Supreme Court, the appellant must also file a petition for appeal within three months of entry of judgment. Va. Sup. Ct. Rule 5:17(a). The latter requirement, unlike Rule 5:9, is dictated by statute. *See* Va. Code § 8:01-671. Coleman's petition for appeal was filed within the statutorily mandated period.

[5] Virginia's conflicting precedents regarding its time limits for taking appeals highlight the wisdom of the plain statement rule. Although the time limits are described as "mandatory," *see* Virginia Supreme Court Rule 5:5(a), the Virginia Supreme Court has granted relief from their requirements. *See Tharp v.*

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parties briefed both the lateness of the appeal and the appeal's merits to the Virginia Supreme Court. The court noted that it had permitted late appeals in the past where appellants "had been denied their constitutional rights." 207 Va. at 715, 152 S.E.2d at 284. Because it determined that appellant's assertion that the Virginia statute at issue unconstitutionally deprived her of a vested property right was without merit, the court declined to hear the late-filed appeal and deferred decision as to whether it would hear late-filed appeals concerning deprivations of constitutional property rights. *Id.* Like the order at issue here, the opinion concluded with the words "appeal dismissed." *Id.* at 719, 152 S.E.2d at 287.

A state basis of decision will not bar federal review of a federal issue which was before the state court unless the state ground is adequate and independent.[6] In

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*Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970); *O'Brien*, 207 Va. at 715, 152 S.E.2d at 284. At one time, the court routinely allowed late appeals, but it found that attorneys were abusing the court's "indulgence." *See Tharp*, 211 Va. at 2-3, 175 S.E.2d at 278. In *Tharp*, the court held that it would allow late appeals only to correct constitutional violations. ("Henceforth we will extend the time for filing a petition for a writ of error only if it is found that to deny the extension would abridge a constitutional right."). *Id. See also National Capital Naturists, Inc. v. Board of Supervisors*, 878 F.2d 128, 132 (4th Cir. 1989) (where petition for appeal presents no constitutional claims, Virginia Supreme Court will not hear untimely appeal) (citing *Tharp*).

[6] When a judgment rests on an adequate and independent state law ground, federal review is precluded because the state court judgment will stand regardless of the determination on

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*Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), for example, the Court found that it had jurisdiction to review a Michigan court decision because that court's analysis of state constitutional law on search and seizure was based upon its view of federal fourth amendment law such that the state ground was not independent of federal law.

Similarly, in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court recognized that a state procedural basis for decision may not be independent of federal law. In *Ake*, the Court found that dismissal of a federal claim for failure to comply with the Oklahoma procedural rule precluding

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the federal ground. On direct review, an adequate and independent state ground divests the Court of jurisdiction. *See, e.g., Murdock v. City of Memphis*, 20 Wall 590, 635-636 (1875); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment"). The doctrine also applies when the state law basis for decision is procedural. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (procedural bar from failure to raise claim in assignment of error on appeal did not preclude review because the ground was not "separate, adequate, and independent" of federal law); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

As a matter of comity, the Court has applied the adequate and independent state ground doctrine to bar federal habeas review even though an adequate and independent state ground does not "dispossess the federal courts of jurisdiction on collateral review." *Harris*, 489 U.S. at 267 (Stevens, J., concurring) (citing *Wainwright v. Sykes*, 433 U.S. 72, 82-84 (1977), and *Fay v. Noia*, 372 U.S. 391, 426-35 (1963)).

appellate review of any issue not raised in the assignment of error presented in the motion for a new trial unless the error is "fundamental" was not independent of federal law, because errors of federal constitutional law are included within the definition of "fundamental error." *Ake*, 470 U.S. at 74-75. Because "resolution of the state procedural law question depend[ed] on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law." *Id. See also Williams v. Georgia*, 349 U.S. 375, 383, 389 (1955).

### B. The Fourth Circuit's Analysis Of State Law To Resolve The Ambiguity In The Virginia Supreme Court's Order Violates The Rule Of *Harris v. Reed*.

The Virginia Supreme Court's dismissal order lacks a plain statement of its basis; accordingly, it cannot be presumed to be based upon an adequate and independent state ground. This Court created the plain statement rule to provide a "consistent approach for resolving th[e] vexing issue" of determining the basis of state court decisions. *Long*, 463 U.S. at 1038.[7] In *Long*, the Court formulated the plain statement rule as follows:

> when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

[7] Before *Long*, the Court had applied a number of methods to obtain clarification of state court rulings, among them, vacating or continuing a case while requesting clarification from the state court, and analyzing state law to determine the basis of the decision. *See Long*, 463 U.S. at 1038-39.



*Id.* at 1040-41.

In *Harris v. Reed*, the Court extended the plain statement rule to apply to the determination of whether an adequate and independent state ground barred federal habeas review of state court decisions:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.

*Harris*, 489 U.S. at 263 (quoting *Caldwell*, 472 U.S. at 327). *Harris* further recognized that the plain statement rule applied to summary orders such as the one issued by the Virginia Supreme Court in *Coleman*: "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " 489 U.S. at 265.

The Fourth Circuit failed to follow the "plain statement" rule when, in an attempt to resolve the ambiguity inherent in the order, it examined Virginia law. Because nothing in the order informed the Fourth Circuit of its basis, the court looked to other sources: the Commonwealth's motion to dismiss the appeal[8] and Virginia

[8] The Fourth Circuit could not properly find that the dismissal was based on procedural grounds simply because the

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Supreme Court Rule 5:9. The court noted that the motion was based on Rule 5:9, and it found that rule to be a mandatory rule constituting an adequate state ground.[9] 895 F.2d at 143 (JA 58.) (citing Virginia Supreme Court Rule 5:9 and *Vaughn v. Vaughn*, 215 Va. 328, 210 S.E.2d 140 (1974)). The Fourth Circuit failed to explain the significance of the Virginia Supreme Court's consideration of the merits' briefs or of the court's consideration of the federal merits in other cases to inform its decision of whether to hear a late-filed appeal.[10]

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motion to dismiss was brought on procedural grounds. In the absence of a clear statement, it is not for the federal courts to determine what an order inherently means. Thus, the Sixth Circuit has recognized that *Harris* precludes analysis of state law in determining the meaning of summary orders declining to hear late appeals. *See, e.g., Johnson v. Burke*, 903 F.2d 1056, 1059 (6th Cir.) (rejecting state's assertion that denial of an application to file a delayed appeal is "inherently a decision that relies on procedural grounds"), *cert. denied*, 111 S. Ct. 178 (1990); *Hill v. McMackin*, 893 F.2d 810, 813-14 (6th Cir. 1989).

[9] Contrary to the Fourth Circuit's conclusion, Coleman's late appeal is not an "adequate" state ground barring federal habeas review. Under Virginia's rules, Coleman's notice of appeal would have been timely if it had been dispatched on October 6 by registered or certified, rather than first class, mail. Va. Sup. Ct. Rule 5:5(b). Both the Commonwealth and the Circuit Court received the notice; neither would have received it sooner had it been certified. Under these circumstances, Coleman's one-day-late filing is not an adequate state ground preventing federal habeas review of his constitutional claims. *Cf. Fay v. Noia*, 372 U.S. at 462 (Harlan, J., dissenting) (questioning adequacy of state rule at issue in *Daniels v. Allen*, 344 U.S. 443 (1953)).

[10] The Fourth Circuit also failed to recognize that Virginia courts know how to say that their decisions are based upon

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The Fourth Circuit's approach conflicts directly with *Harris v. Reed*. In *Harris*, the Court acknowledged that the Illinois court's reference to a procedural default rule coupled with its statement that certain of the petitioner's claims fell within the parameters of that rule "perhaps laid the foundation" for a finding of procedural bar. 489 U.S. at 266. However, the Court declined to find that these references constituted an adequate and independent state ground because the state court discussion fell "short of an explicit reliance on a state-law ground." *Id.* The Court did not attempt to cure the ambiguity by analyzing state law to determine whether the procedural bar was mandatory. Indeed, the Court recognized that failure "to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim." *Id.* at 261. Instead, the state court must have "actually relied on the procedural bar as an independent basis for its disposition of the case." *Id.* at 261-62 (quoting *Caldwell*, 472 U.S. at 327).

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independent procedural grounds. *See, e.g., Dodson v. Director of Corrections*, 233 Va. 303, 305, 355 S.E.2d 573, 574 (1987) (quoting dismissal of petition for appeal because "the appeal was not perfected in the manner provided by law. . . . Rule 5:14(a)"); *Titcomb v. Wyant*, 323 S.E.2d 800 (Va. 1984) (dismissal of habeas appeal by stating: "On consideration whereof, the Court holds that exclusive jurisdiction over this appeal lies with the Court of Appeals, pursuant to Code §§ 17-116.04 and 17-116.05:4".); *Coppola v. Warden*, 222 Va. 369, 373, 282 S.E.2d 10, 12 (1981) ("Having ruled that the procedural question is dispositive, we do not reach [the federal question]. We will affirm the judgment of the trial court dismissing the petition."), *cert. denied*, 455 U.S. 927 (1982).

The same analysis compels a finding that the Virginia order is ambiguous. The order mentions both state and federal law and implies that the court considered both. As in *Harris*, there is no "explicit reliance" on an independent state law basis. *See Harris*, 489 U.S. at 266. The Fourth Circuit had no basis for finding otherwise.

### C. The Plain Statement Rule Provides A Consistent Rule That Does Not Interfere With The Ability Of The State Courts To Enforce Their Procedural Rules.

By providing state courts with a bright line test for how federal courts will determine the basis for state court decisions, the plain statement rule enables state courts to assure that the federal courts give "the respect [they] owe to the procedures erected by the state to correct constitutional errors." *Harris*, 489 U.S. at 268 (O'Connor, J., concurring). The rule's clear terms allow state courts to rely on their own rules of decision and thus, in effect, to restrict federal review simply by expressly stating a procedural bar. *Id.* at 264.[11] In establishing the plain

[11] Since the rule was announced in 1983, "state courts have become familiar with the 'plain statement' requirement under *Long* and *Caldwell*." *Harris*, 489 U.S. at 264. *See, e.g., Shaddy v. Clarke*, 890 F.2d 1016, 1018 (8th Cir. 1989) (summary order of Nebraska Supreme Court dismissing late-filed appeal on state procedural grounds); *Clark v. Dugger*, 901 F.2d 908, 913-14 (11th Cir.) (Florida Supreme Court order clear), *cert. denied*, 111 S. Ct. 372 (199[illegible]; *Anselmo v. Sumner*, 882 F.2d 431, 434 (9th Cir. 1989) (Nevada Supreme Court order clear). In each of these cases, the procedural basis for the state order was apparent from the four corners of the order. Virginia courts also frequently provide plain statements of their reliance on state law. See cases cited in note 10, *supra*.



statement rule, the Court sought a method of analysis that would achieve the "doctrinal consistency that is required when sensitive issues of federal-state relations are involved." *Long*, 463 U.S. at 1039; *see Harris*, 489 U.S. at 262 (extending plain statement rule to collateral review for the same reason).[12] *Harris* frees states from the federal interference that would result from any approach that allowed federal courts to undertake their own state law analysis to decide what they think the state court meant. Once a federal court, like the Fourth Circuit here, purports to tell state courts what their ambiguous orders mean, the state courts lose the discretion that *Harris* ceded to them.

The straightforward analysis that the plain statement rule requires also eases the burden on federal courts for determining the basis for a state court decision. The *Harris* presumption allows a federal court to "rapidly . . . identify whether federal issues are properly presented before it." *Harris*, 489 U.S. at 265. Without such a rule, "the federal habeas court would be forced to examine the state-court record to determine whether procedural default was argued to the state court, or would be required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially

[12] The plain statement rule does not apply to cases where the federal claims were never raised to the state courts, *i.e.*, where the issue is whether the petitioner has exhausted state remedies. *See Harris*, 489 U.S. at 263 n.9; *id.* at 268-70 (O'Connor, J., concurring); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (applying state law to determine that issue never raised to state court was procedurally barred).

applicable to the particular case." *Harris*, 489 U.S. at 264-65.

Federal courts are not well equipped to undertake such analysis. It is not simply that the federal court may make an error as to what the state law is (as did the Fourth Circuit in *Coleman*), but that a court can never state conclusively the meaning of an inherently ambiguous order, such as that issued by the Virginia Supreme Court here.

Coleman raised substantial federal constitutional claims in his state habeas corpus petition. The Virginia Supreme Court's order dismissing his appeal does not plainly state that the decision was based on state law. Federal habeas court review of constitutional claims is not barred by a state decision not clearly based on an independent state law ground. The Court should therefore find that Coleman has not defaulted on his federal claims and remand for a determination of the merits.

## II.

## COLEMAN'S STATE HABEAS COUNSEL'S LATE FILING OF AN APPEAL CONSTITUTES CAUSE TO EXCUSE THE PROCEDURAL DEFAULT.

Even if the Court finds that the Virginia Supreme Court dismissed Coleman's appeal on an independent state ground, it should allow federal review of Coleman's constitutional claims. The Court has recognized that federal habeas courts have jurisdiction to hear a petitioner's federal claims, regardless of state defaults. However, as a matter of comity, it has fashioned a rule of limited discretion that precludes review of federal claims that have



been defaulted in state court, unless federal review is necessary to assure fundamental fairness.[13] The doctrine guiding that discretion is embodied in the "deliberate bypass" and the "cause and prejudice" standards.

Under these standards, a petitioner ordinarily will be held responsible for strategic decisions and even inadvertent mistakes of counsel on matters traditionally committed to the discretion of counsel. However, when counsel is ineffective, or when the default is caused by some impediment external to the defense, the petitioner will not be held to suffer the consequences. In addition, certain fundamental decisions, such as the decision whether to appeal, are not committed to counsel alone. Unless the petitioner himself knowingly and intelligently makes such a decision that results in a default, a federal court will not bar his access to federal habeas.

In this case, counsel's failure to appeal can be neither imputed to Coleman nor characterized as a deliberate bypass of state procedure. Coleman wanted to appeal and had reasonably assumed that his counsel would take the steps required to do so. He cannot be held responsible for

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[13] The Court has recognized that "[t]oday, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.' " *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. at 97 (Stevens, J., concurring)); *see Fay v. Noia*, 372 U.S. 391, 401-02 (1963) ("[I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."). But the writ also involves significant costs. *E.g., Engle*, 456 U.S. at 126-28 (writ undermines finality, diminishes the prominence of trial, costs society the right to punish admitted offenders, and intrudes into state processes).

his counsel's failure to file the most routine of documents in a timely manner. Such deficient representation must constitute cause to excuse the default.

Coleman's federal habeas petition presents substantial constitutional claims concerning juror bias, *Brady* violations by the Commonwealth and attorney ineffectiveness at trial.[14] These claims, which go to the heart of the truth-finding process, undermine confidence in the integrity of the verdict and sentence pursuant to which Coleman is to be executed. If the state default is allowed to stand, Roger Coleman will be precluded from demonstrating that the verdict and sentence of death imposed on him are unreliable.

**A. Ineffective Assistance Of Post-Conviction Counsel Constitutes Cause.**

The Fourth Circuit held that because the assistance of post-conviction counsel is not constitutionally required, the ineffectiveness of such counsel cannot supply

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[14] The Court has recognized that the special role of counsel in criminal proceedings means that the need to vindicate ineffectiveness claims can override concerns for both finality and comity. *See Strickland v. Washington*, 466 U.S. at 697-98 (declining to establish different standards for federal collateral review of ineffectiveness claims, because an ineffectiveness claim is "an attack on the fundamental fairness of the proceeding whose result is challenged" and "fundamental fairness is the central concern" of habeas); *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) ("[W]hile the Court may . . . refuse for reasons of prudence and comity to burden the State with the costs of the exclusionary rule . . . , the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance.").



"cause."[15] 895 F.2d at 144. (JA 60-61.) While it is true that Coleman had no constitutional right to post-conviction counsel, *Murray v. Giarratano*, 109 S. Ct. 2765 (1989), it does not follow that the ineffectiveness of his counsel cannot constitute cause. The existence of a constitutional right to counsel is irrelevant under *Murray v. Carrier*: "cause" is satisfied whenever a prisoner is prevented from complying with a state procedural rule by an attorney whose performance falls outside "the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. at 689. *Murray v. Carrier* was decided in the

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[15] Because the Fourth Circuit concluded that ineffective assistance of state habeas counsel could not constitute cause to excuse Coleman's procedural default, it did not decide whether counsel's conduct rose to the level of cause. Clearly it did. Courts have consistently held that an attorney's failure to perfect a timely appeal constitutes ineffective assistance of counsel. *E.g., Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *United States v. Reyes*, 759 F.2d 351, 353 (4th Cir.), *cert. denied*, 474 U.S. 857 (1985); *Perez v. Wainwright*, 640 F.2d 596, 598 & n.3 (5th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982); *Lucey v. Kavanaugh*, 724 F.2d 560, 562 (6th Cir. 1984), *aff'd sub nom. Evitts v. Lucey*, 469 U.S. 387 (1985); *Clay v. Director*, 749 F.2d 427, 431 (7th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); *Williams v. Lockhart*, 849 F.2d 1134, 1137 & n.3 (8th Cir. 1988); *Miller v. McCarthy*, 607 F.2d 854, 857 (9th Cir. 1979); *Ferguson v. United States*, 699 F.2d 1071, 1072-73 (11th Cir. 1983); *cf. United States v. Estela-Melendez*, 878 F.2d 24, 26-27 (1st Cir. 1989) (failure to appeal caused by defendant's voluntary decision not to appeal or belated change of heart regarding appeal would not constitute ineffective assistance).

Coleman relied on his attorneys to comply with his decision to appeal. (JA 33.) *See* ABA Model Code of Professional Responsibility DR 6-101(3) & n.5 (1986) (defining "Failing to Act Competently") ("attorneys shall not neglect legal matters entrusted to them").

context of a procedural default caused by attorney error that did not rise to the level of ineffective assistance. Accordingly, the Court's holding that "[a]ttorney error short of ineffective assistance of counsel does not constitute cause," 477 U.S. at 492, is simply an invocation of *Strickland's* functional standard, not a requirement of an independent constitutional violation.[16] To interpret *Carrier* differently would render it internally inconsistent and would frustrate the goal of fundamental fairness.

**1. *Murray v. Carrier's* invocation of "ineffective assistance" as the standard for cause refers to a level of attorney competence, not to a sixth amendment right to counsel.**

Carrier conceded that his attorney had rendered effective assistance. Thus, the issue presented was whether attorney error not sufficient to contravene the *Strickland* standard could constitute cause.[17] The Court

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[16] Indeed, counsel's failure to take an appeal as requested by his client constitutes cause even without reference to ineffectiveness. *See Jones v. Barnes*, 463 U.S. 745, 755 (1983) (Blackmun, J., concurring in the judgment) ("the attorney, by refusing to carry out his client's express wishes, cannot forever foreclose review of nonfrivolous constitutional claims . . . counsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute 'cause and prejudice' for any resulting procedural default under state law"); *id.* at 754 n.7 (reserving question).

[17] After *Wainwright v. Sykes*, a debate raged among the lower federal courts and legal scholars as to what showing of attorney responsibility would suffice to excuse an appellate procedural default. Most courts and commentators agreed that

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held that it could not. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." 477 U.S. at 488; *see id.* at 492 ("Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default. . . . "); *cf. Murray v. Carrier*, 477 U.S. 478, 524 (1984) (Brennan, J., dissenting) (arguing that inadvertent mistakes should constitute cause).

The Court reasoned that to hold otherwise would mean that federal courts would "routinely be required to hold evidentiary hearings to determine what prompted

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counsel's strategic decisions not to raise issues on appeal could not constitute cause. But they disagreed as to whether counsel's inadvertent or ignorant errors should constitute cause or whether cause could be satisfied only by error rising to the level of ineffective assistance of counsel. *Compare Alcorn v. Smith*, 781 F.2d 58 (6th Cir. 1986), *with Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983), *adhered to en banc*, 754 F.2d 520 (1985), *rev'd sub nom. Murray v. Carrier*, 477 U.S. 478 (1986).

The Court granted certiorari in *Carrier* to resolve the debate. "We granted certiorari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons." *Murray v. Carrier*, 477 U.S. at 481-82. *See also Carrier v. Hutto*, 724 F.2d at 401 (4th Cir. 1983) ("we conclude that attorney error short of wholesale ineffectiveness of counsel can constitute *Wainwright* cause").

counsel's failure to raise the claim in question," *id.* at 487, and that the determination would be difficult. *Id.* at 488 ("Does counsel act out of 'ignorance,' for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent? The uncertain dimensions of any exception for 'inadvertence' or 'ignorance' furnish an additional reason for rejecting it."). *See also id.* at 492.

Thus, the Court chose the functional standard set forth in *Strickland*. That standard provides federal courts with a yardstick familiar in both constitutional and non-constitutional settings.[18] It is also a reasonable gauge for when to attribute attorney error to a petitioner and when

[18] In the abuse-of-the-writ context, for example, the Fifth Circuit has recognized that habeas counsel's ineffectiveness may excuse a claim's omission from a prior habeas petition:

> Counsel competence in habeas proceedings is not a constitutional inquiry, since a state has no constitutional duty to provide counsel in collateral proceedings. Instead the question is whether such incompetence excuses the failure to include the new claim in the old petition. . . . The standard for measuring competence of counsel, while developed in the context of constitutional right, is a familiar one. We are persuaded that this standard vindicates the competing values of facilitating judicial review of meritorious claims and finality of criminal convictions in habeas cases.

*Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 976 (1984); *Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir. 1985); *accord, Hanrahan v. Gramley*, 664 F. Supp. 1183, 1191 (N.D. Ill. 1987). *See also United States v. Golden*, 854 F.2d 31, 32 (3rd Cir. 1988).



to relieve a petitioner of the effects of such error. While the risk of an attorney's strategic decisions and inadvertent mistakes can be fairly borne by a petitioner, a lawyer's wholesale ineffectiveness cannot. *Cf. Carrier*, 477 U.S. at 488, 492. Thus, the failure to perfect an appeal, whether or not by a constitutionally-required lawyer, constitutes cause.

### 2. *Murray v. Carrier* makes clear that cause need not be an independent constitutional violation.

While the precise parameters of the cause and prejudice standard remain to be defined,[19] it is indisputable that cause need not be an independent constitutional violation. *See, e.g., Murray v. Carrier*, 477 U.S. at 489 ("The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause – a question of federal law – without deciding an independent and unexhausted constitutional claim on the merits."); *id.* at 488 (listing examples of cause).[20]

[19] The Court has intentionally left the content of the cause and prejudice standard somewhat vague, preferring to elaborate the standard when faced with particular procedural default situations. *See, e.g., Smith v. Murray*, 477 U.S. 527, 533-34 (1986); *Reed v. Ross*, 468 U.S. 1, 13 (1984); *Wainwright v. Sykes*, 433 U.S. at 87, 91 (1977).

[20] In *Carrier*, the Court noted that exhaustion doctrine "generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." 477

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It would indeed be incongruous to require that a petitioner show that an independent constitutional violation caused his procedural default because, if it had, the petitioner would normally be entitled to relief on the basis of that violation and would not have to rely on cause and prejudice.[21] The Court has never required such a showing. Rather, it has made clear that cause for failing to comply with state procedural rules may consist of a showing that the facts supporting the claim were unavailable at the time of the default, *e.g., Amadeo v. Zant*, 486 U.S. 214, 222, 224 (1988), that interference by state officials (not necessarily rising to the level of an independent constitutional violation) prevented the timely assertion of a claim, *e.g., Murray v. Carrier*, 477 U.S. at 488, or that some other external impediment made compliance with the state's procedural rule impracticable. *Id.*

Of course, where an attorney's performance violates the sixth amendment, the Constitution itself requires the default to be attributed to the state, rather than to the defendant. *Id.*[22] But the question posed by *Sykes* and

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U.S. at 489. However, because ineffective assistance of state habeas counsel does not rise to the level of an independent constitutional claim, exhaustion is unnecessary. *Id.*

[21] State rules enforcing procedural defaults caused by independent constitutional violations or state action would also presumably fail adequacy review; there would be no need for cause if it were to be limited to such factors.

[22] "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Id.*



*Carrier* is not whether the default may be imputed to the state, but rather whether the petitioner can fairly be held responsible for the default. *E.g., Sykes*, 433 U.S. at 91 & n.14; *Carrier*, 477 U.S. at 492. It is not fair to hold the petitioner responsible for defaults caused by an ineffective lawyer. By performing outside "reasonable professional" standards the lawyer ceases to be an agent of the petitioner and instead becomes an obstacle to the defense. *Cf. Carrier*, 477 U.S. at 488, 492.[23] For that reason, attorney error that rises to the level of ineffectiveness should constitute cause regardless of whether the attorney was constitutionally required.

### 3. *Murray v. Carrier* teaches that "the standard for cause should not vary depending on the timing of a procedural default."

Limiting cause based on attorney error to independent sixth amendment violations rather than to attorney incompetence meeting the functional standard set forth in *Strickland* would also clash with *Murray v. Carrier's* teaching that state procedural defaults are to be treated consistently regardless of the stage at which they occur:

> A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. . . . We likewise believe that *the standard for cause should not vary depending on the timing of a procedural default.*

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[23] The Court has recognized that counsel's actions short of constitutional violations may constitute cause. *See Reed v. Ross*, 468 U.S. 1, 14-15, 16 (1984) (recognizing as cause attorney's failure to raise a legal claim "not reasonably available" to him without suggesting that attorney's failure rose to the level of an independent constitutional violation).

477 U.S. at 490-91 (emphasis added); *see Smith v. Murray*, 477 U.S. 527, 533 (1986) (reiterating *Carrier's* holding that trial and appellate defaults are to be evaluated under identical standards).[24]

There is no sound rationale for making it harder to show cause to excuse defaults occurring on collateral attack than to excuse defaults on direct appeal. *See Murray v. Carrier*, 477 U.S. at 491 ("the standard for cause should not vary depending on . . . the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process"); *Smith v. Murray*, 477 U.S. at 533 ("concerns for finality and comity are virtualiy identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure"); *Reed v. Ross*, 468 U.S. 1, 10 (1984) ("Each State's complement of procedural rules facilitates this complex process [of assuring accurate and constitutional verdicts], channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.").[25]

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[24] There is no constitutional right to counsel, and thus no constitutional right to effective assistance of counsel, for discretionary appeals. *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974); *Wainwright v. Torna*, 455 U.S. 586, 587 (1982). It is therefore impossible to reconcile the Court's reiteration that trial and appellate defaults are to be treated identically with an interpretation of *Murray v. Carrier* that limits cause for attorney ineffectiveness to independent constitutional violations.

[25] If there is to be any distinction, standards for cause should be lower when a default occurs on collateral attack. *See*

(Continued on following page)



But limiting cause based on attorney error to independent constitutional violations of the right to effective assistance of counsel would accomplish just such a distinction between procedural defaults at various stages of the judicial process. It would eliminate attorney ineffectiveness – a significant source of procedural default – as cause excusing procedural defaults occurring on discretionary appeals and collateral review of convictions. It would thus make it more difficult to show cause to excuse a procedural default simply because the default occurred at one stage rather than another of the conviction and review process.

Such a rule would be intolerable. If federal courts were to recognize state procedural defaults uniformly regardless of the stage at which they occur, but to find cause differently depending on whether there was a constitutional right to counsel at the stage at which the default occurred, state prisoners would be treated inconsistently. Access to federal courts would vary with the luck of the draw: if the default occurred on direct appeal it would be excused, if not, it would be enforced. The inequity of such a result is increased by the fact that petitioners who have no constitutional right to effective assistance of counsel are considerably more likely to founder in their attempts to navigate complex appellate and collateral review procedures than are those who have

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*Gilmore v. Armontrout*, 867 F.2d 1179, 1180 n.1 (8th Cir. 1989) (Lay, C.J., dissenting from denial of rehearing *en banc*). By providing for collateral review, a state concedes that its interest in the finality of criminal convictions can be outweighed by the need to correct fundamentally unfair convictions.

the right to the assistance of nominally effective counsel. *See generally Murray v. Giarratano*, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring); *id.* at 2778-80 (Stevens, J., dissenting).

If default rules are to be enforced consistently at all trial and review stages, the decision to excuse a default should be based on the same standard. Attorney conduct that justifies excusing a default on direct review should excuse the same default on collateral review.

**4. The safeguard of effective representation is integral to procedural default doctrine.**

Finally, but perhaps most importantly, a holding that ineffective assistance of habeas counsel does not constitute cause would remove the safeguard that *Murray v. Carrier* relies on to prevent miscarriages of justice. Responding to the concerns raised by the concurrence of Justice Stevens, the majority wrote:

> There is an additional safeguard against miscarriages of justice in criminal cases . . . . That safeguard is the right to effective assistance of counsel. . . . *The presence of such a safeguard may properly inform this Court's judgment in determining "[w]hat standards should govern the exercise of the habeas court's equitable discretion" with respect to procedurally defaulted claims. Reed v. Ross*, [468 U.S. 1, 9 (1984)]. The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices.

477 U.S. at 496 (emphasis added). *See also Smith v. Murray*, 477 U.S. at 539 (no fundamental unfairness requiring the exercise of federal habeas jurisdiction "when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure").



The Court has thus relied on the effective assistance of counsel to overcome any flaws in the doctrine of procedural default that might result in fundamental unfairness for federal habeas petitioners. That safeguard falls unless ineffective assistance of counsel on discretionary or collateral review constitutes cause.

**B. Procedural Defaults Resulting From The Ineffective Assistance Of Post-Conviction Counsel Must Be Excused.**

**1. Because ineffective assistance of post-conviction counsel is not an independent constitutional violation, it must constitute cause.**

Six justices in *Murray v. Giarratano* recognized the need for legal assistance to aid capital prisoners seeking to vindicate constitutional claims in habeas proceedings. *Murray v. Giarratano*, 109 S. Ct. at 2772 (Kennedy, J., joined by O'Connor, J., concurring in the judgment); *id.* at 2776 (Stevens, J., joined by Brennan, J., Marshall, J., Blackmun, J., dissenting).[26] The majority of the Court held that

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[26] Virginia's procedures for securing post-conviction representation for death row prisoners are less "far reaching and effective" than those in other states. *See Murray v. Giarratano*, 109 S. Ct. at 2773 (Kennedy, J., concurring in the judgment); *id.* at 2781-82 (Stevens, J., dissenting).

such legal assistance was, nonetheless, not constitutionally required. 109 S. Ct. at 2770-71.

Petitioner does not seek to reargue *Giarratano*. But, given *Giarratano*'s recognition of the crucial role of counsel in collateral review, we respectfully submit that habeas counsel's ineffectiveness must constitute cause. It is one thing to allow states discretion in deciding how to give prisoners meaningful access to the judicial process. It would be quite another to direct the federal courts to close their doors to federal constitutional claims defaulted through the ineffectiveness of state post-conviction counsel.

The Constitution allows states "substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). *See Murray v. Giarratano*, 109 S. Ct. at 2772 (O'Connor, J., concurring) (states have "considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process"). States are not required to provide a forum for discretionary appeals or collateral attacks on convictions. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *Pennsylvania v. Finley*, 481 U.S. at 559. And even when states choose to allow such review, they are under no obligation to provide counsel. *Murray v. Giarratano*, 109 S. Ct. at 2769; *Wainwright v. Torna*, 455 U.S. 586, 587 (1982).

Recognition of states' "substantial discretion" to shape post-conviction remedies should not, however, lead to a regime under which federal review of federal constitutional claims can be frustrated by the ineffective



performance of state habeas counsel. So long as ineffective assistance of state post-conviction counsel constitutes cause, this result will be avoided, and the availability of federal review will not be reduced to a matter of caprice or chance.

**2. Ineffective assistance of counsel in the first forum in which a constitutional claim may be vindicated must constitute cause.**

Where constitutional claims cannot be raised until collateral review, ineffective assistance of counsel in connection with that review must constitute cause. Coleman could not have raised claims of ineffective assistance of trial counsel during the direct review of his conviction.[27] *See Walker v. Mitchell*, 224 Va. 568, 571, 299 S.E.2d 698, 699-700 (1983); *Murray v. Giarratano*, 109 S. Ct. at 2778-79 (Stevens, J., dissenting). Prisoners in Virginia are thus precluded from asserting certain fundamental constitutional rights in state proceedings in which they are constitutionally entitled to the assistance of counsel. They are forced instead to rely on post-conviction review, where

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[27] Likewise, Coleman's juror bias and some of his *Brady* claims were not available until collateral review. At the time of his direct appeal, Coleman could not have known that a juror had lied at voir dire in order to be seated on the jury to help "burn" Coleman. (Fourth Cir. App. 680.) Coleman also had no reason to suspect that the prosecution had withheld an investigative report indicating that there was a "pry mark" on the door of the McCoy household. (Fourth Cir. App. 1114.) This evidence of forced entry would have helped Coleman refute the prosecution's assertion that Ms. McCoy knew her attacker.

they have no right to counsel and thus no constitutional guarantee of effective assistance of counsel, for vindication of those rights.[28]

Ironically, Roger Coleman has been asserting that his trial counsel provided ineffective representation since immediately following his change of venue hearing at which counsel was so inadequately prepared and presented so little evidence that the trial court offered a continuance (which counsel refused).[29] But under Virginia procedure, Coleman was not allowed to raise his

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[28] Prior to July 1, 1985, no claim of ineffectiveness of counsel could be raised on direct review in Virginia. *See Dowell v. Commonwealth*, 3 Va. App. 555, 562, 351 S.E.2d 915, 919 (1987) (citing *Walker v. Mitchell*). From July 1, 1985 through July 1, 1990, ineffectiveness claims could be raised on direct review where "all matters relating to such issue [were] fully contained within the record of the trial." Va. Code § 19.2-317.1. That statute has recently been repealed. 1990 Va. Acts c. 74 (eff. July 1, 1990).

[29] Letter of Roger Coleman to Judge Persin, dated February 15, 1982 (commenting on fact that attorney seemed "ill prepared" and had failed to muster available evidence) (Fourth Cir. App. 34-36.) The attorney responsible for Coleman's change of venue hearing notified co-counsel thirty minutes before the hearing that he did not plan to appear. Perhaps as a result, Coleman's counsel offered no affidavits, no witnesses other than Coleman's father, and no evidence other than five newspaper articles, three of which Coleman himself provided immediately before the hearing. The failure to secure a change of venue and the failure to conduct an adequate voir dire examination contributed to the seating of a jury which knew that Coleman had a prior conviction for attempted rape and of a juror who had previously stated that he wanted to get on the jury to "help burn the S.O.B." (Fourth Cir. App. 18, 747-48, 756, 674, 680, 962.)



ineffectiveness claim until state habeas. There, the ineffective assistance of his state habeas counsel in failing to file a timely appeal caused the claim to be defaulted. Virginia thus places petitioners in a Catch-22 situation: by the time they are allowed to raise their claims of ineffective assistance of trial counsel, they no longer have the constitutional right to be assisted by counsel. Without the right to such assistance, petitioners are more likely to default on their claims. And when they do, they will have no remedy for the default.

The Virginia rule limiting ineffectiveness claims to collateral review thus makes it likely that petitioners will consistently be denied the right to litigate their sixth amendment claims in federal court. If Coleman's default had occurred instead on direct appeal, he might have been precluded from further state review of his ineffectiveness claim.[30] But he would nonetheless have been entitled to federal habeas review of the claim. *See Murray*

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[30] Virginia's rationale for limiting ineffectiveness claims to collateral review is two-fold: *(1)* because ineffectiveness claims will not ordinarily be developed on the trial record, such claims often require an evidentiary hearing that is more appropriate on collateral than direct review; and *(2)* if such claims could be raised on direct appeal, the Commonwealth's procedural default rules might preclude further state-court litigation of ineffective assistance claims defaulted at trial and direct appeal or decided adversely on direct appeal because of an inadequately-developed record. *See Walker v. Mitchell*, 224 Va. at 570-71, 299 S.E.2d at 699. A state's decision as to the time at which constitutional claims may be asserted is, in large part, its own business. But the state's decision should not be allowed to control federal habeas court review of federal constitutional claims. *Cf. Ex. parte Hull*, 312 U.S. 546, 549 (1941).

*v. Carrier*, 477 U.S. at 488 (ineffective assistance of counsel is cause for procedural default). *See also Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Osborn v. Shillinger*, 861 F.2d 612, 622-23 (10th Cir. 1988). The result must be the same in this situation, where the default occurred on collateral review, particularly if the claim could not be raised on direct review. Otherwise, by channeling constitutional claims into collateral rather than direct review, states will be able to control the likelihood of federal habeas review of federal constitutional claims.[31] A procedural default doctrine that lends itself to such manipulation is indefensible.

The comity concerns that led to the creation of the procedural default doctrine are not served when the state channels review in a way that impedes the vindication of federal claims. *See, e.g., Murray v. Carrier*, 477 U.S. at 488 (cause includes objective factors external to the defense such as interference by state officials); *Alcorn v. Smith*, 781 F.2d 58, 63 (6th Cir. 1986) ("An inadequate state forum for presenting sufficiency of the evidence claims will constitute 'cause' for the procedural default."). *See also Bartone v. United States*, 375 U.S. 52, 54 (1963) (per curiam) ("Where state procedural snarls or obstacles preclude an

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[31] A procedural default that precludes vindication of a petitioner's claim of ineffective assistance of trial counsel may affect not only his sixth amendment right to counsel, but also any other constitutional rights defaulted at trial as a result of trial counsel's ineffectiveness. *Cf. Justus v. Murray*, 897 F.2d 709, 714 (4th Cir. 1990) (ineffective assistance of counsel claim may constitute cause only if it has been exhausted in state court and is not procedurally defaulted).



effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding."); *Brown v. Western Ry.*, 338 U.S. 294, 298-99 (1949) ("Strict local rules . . . cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."); *Ex parte Hull*, 312 U.S. 546, 549 (1941) ("the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus"); *Spencer v. Kemp*, 781 F.2d 1458, 1470 (11th Cir. 1986); (petitioner will not be denied federal review of constitutional claim where state procedure treated claim unfairly).

The Court should adopt a rule that, at a minimum, ensures that petitioners do not lose their ability to raise federal constitutional claims in federal court because of the ineffective assistance of counsel in the first state forum in which the federal claims could be raised. *Cf. Evitts v. Lucey*, 469 U.S. 387, 401-02 (1985) (state cannot evade requirements of federal law by calling appeal as of right discretionary).

## III.

## THE *FAY v. NOIA* DELIBERATE BYPASS STANDARD APPLIES TO COLEMAN'S FAILURE TO APPEAL.

While the circumstances here satisfy the cause and prejudice standard of *Carrier* and *Sykes*, the deliberate bypass standard of *Fay v. Noia*, 372 U.S. 391 (1963), provides an alternative ground for holding that any procedural default that barred Coleman's appeal to the Virginia Supreme Court does not prevent federal habeas

review. In fact, *Noia* continues to supply the most appropriate means of determining whether federal habeas review is precluded as a result of a petitioner's failure to take a state appeal.[32]

The federal habeas petitioner in *Noia* had failed to take a direct appeal from his conviction for felony murder because he feared that upon retrial he might receive the death penalty. After the convictions of two codefendants were vacated on the ground that the confessions underlying both their and Noia's convictions had been coerced, Noia sought *coram nobis* review, which was denied on the ground that he had failed to appeal from his original conviction. 372 U.S. at 395-96 & nn.2-3. The federal district court denied habeas relief based on the state default. *Id.* at 396.[33]

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[32] In *Carrier*, the Court expressly reserved on the question "whether counsel's decision not to take an appeal at all might require treatment under [the deliberate bypass] standard." *Carrier*, 477 U.S. at 492. Several courts have recognized that *Noia* remains applicable to cases within its core rationale. *See, e.g., Osborn v. Shillinger*, 861 F.2d 612, 623-24 (10th Cir. 1988) (applying *Noia*'s deliberate bypass standard to failure to appeal denial of state habeas petition); *Presnell v. Kemp*, 835 F.2d 1567, 1577 (11th Cir. 1988) ("[the cause and prejudice test] did not render [*Noia*] a dead letter"), *cert. denied*, 488 U.S. 1050 (1989); *Ashby v. Wyrick*, 693 F.2d 789, 794 (8th Cir. 1982) (*Noia* approach is appropriate where default involves choice customarily made by client).

The Fourth Circuit attempted to avoid the application of *Noia* by drawing a specious distinction between the failure to implement a decision to appeal and a failure to appeal. 895 F.2d at 143-44. (JA 59-60.) The distinction does not hold because, in each case, the default is the failure to appeal.

[33] The Second Circuit reversed, holding that exceptional circumstances excused Noia's default, which it termed a failure to exhaust. *Id.* at 397.



This Court held that federal habeas review was not barred because Noia had not "deliberately by-passed the orderly procedure of the state courts." *Id.* at 438. Grounding the deliberate bypass test on the familiar notion of waiver as "an intentional relinquishment or abandonment of a known right or privilege," *id.* at 439 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), the Court held that a state default would bar federal habeas review if the petitioner "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures." *Id.* The Court also recognized that certain decisions of counsel could result in procedural defaults barring federal habeas review. *Id.* ("[a] choice made by counsel not participated in by the petitioner does not *automatically* bar relief") (emphasis added).

Soon after *Noia*, the Court elaborated its view that counsel's decisions would, in many circumstances, bind the federal habeas petitioner. For example, in *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965), the Court observed that the petitioner would bear the consequences of any default resulting from his trial counsel's decision not to make a contemporaneous objection to the admission of constitutionally tainted evidence. Similarly, in *Estelle v. Williams*, 425 U.S. 501, 509 n.3 (1976), the Court held that the *Johnson v. Zerbst* waiver standard would not apply "to strategic and tactical decisions, even those with constitutional implications, by a counseled accused."

*Id.* at 512.[34] Finally, in *Sykes* the Court held that the cause and prejudice standard would apply to a default resulting from failure to comply with a contemporaneous objection rule at trial, noting that *Noia*'s suggestion of a more lenient standard was *dictum*. 433 U.S. at 87-88, 91 n.14. *See id.* at 94-95 (Stevens, J., concurring) (*Sykes* "is consistent with the way . . . federal courts have actually been applying [*Noia*]").[35]

The decision in *Sykes* was informed by two principal concerns. First, if applied to trial determinations, the deliberate bypass standard would undermine the legitimate objective of making sure that the trial is the "main event" at which all issues bearing on the substance and the conduct of the case are presented. Second, it was feared that the deliberate bypass rule would interfere with finality and give trial counsel an incentive to attempt a strategy of "sandbagging" – gambling on a verdict of not guilty while holding back some federal constitutional issues so that a guilty verdict could be attacked on federal habeas. *Id.* at 88-90. Later, in *Carrier*,

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[34] *See also Henderson v. Kibbe*, 431 U.S. 145, 157 (1977) (Burger, C.J., concurring) (noting distinction between post-trial omission in *Noia* and omissions during the course of the trial); *Mullaney v. Wilbur*, 421 U.S. 684, 704 n.* (1975) (Rehnquist, J., concurring) (*Noia* rule encompassed the decision not to utilize the appeal process, but should not apply to the failure to make a specific objection during trial).

[35] The Court did not question either the holding of *Noia* or the reasoning of that decision as applied to its facts. 433 U.S. at 87-88 ("It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject."); *id.* at 88 n.12.



the Court recognized that the state's interest in its procedural rules and the threat of providing an incentive to sandbagging required that the cause and prejudice standard apply with equal force to defaults resulting from the failure to raise particular claims on appeal. 477 U.S. at 490-93, 492 ("appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review"); *cf. Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (good appellate counsel winnow arguments and focus on one central or a few key issues).

*Sykes*'s rejection of a broad reading of the deliberate bypass rule rests on a pragmatic view of the criminal process. As Chief Justice Burger explained, because trial decisions are "necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial," it would be impossible to require that the defendant participate in a decision in order to be bound by it. *Sykes*, 433 U.S. at 93-94 (Burger, C.J., concurring).[36]

Neither of the premises of *Sykes* is present where (as here) the state declines to address federal constitutional issues because the petitioner's attorney has failed to file a timely appeal. The state's interest in requiring that the

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[36] *See id.* at 98 (White, J., concurring) ("The bypass rule, however, as applied to events occurring during trial, cannot always demand that the defendant himself concur in counsel's judgment."); *id.* at 94-95 (Stevens, J., concurring) ("The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me.").

federal constitutional issues be raised as part and parcel of the case as a whole is not promoted by barring review where counsel has failed to appeal at all. Equally, there can be no reasonable strategic advantage to forgoing state review altogether, and hence application of the deliberate bypass rule in these circumstances will not encourage sandbagging or otherwise interfere with finality.

Defaults that extinguish all further state remedies cannot be compared to the pruning of legal arguments that necessarily occurs during trial and on appeal. When counsel fails to assert a claim on appeal, only that specific claim is lost. The failure to appeal at all, however, results in the loss of an entire stage of proceedings and with it the opportunity to pursue *all* claims. In this respect, the failure to take an appeal at all is more akin to the decision to plead guilty than to the failure to raise a particular issue on appeal. With either decision, the individual forgoes an entire stage of legal proceedings established to provide a fair determination of his claims. *See Forman v. Smith*, 633 F.2d 634, 640 & n.8 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (suggesting that deliberate bypass remains the appropriate standard where "the procedural default eliminates an entire stage of court proceedings, while Sykes applies to procedural defaults that abandon only a specific claim"). Therefore, just as the decision to forgo a challenge to the state's accusations rests solely with the defendant, so too should the decision to challenge the judgment as a whole rest solely with the defendant.

Indeed, this Court has expressly held that while an attorney has the discretion to decide which issues to raise on appeal, "the accused has the ultimate authority to



make certain fundamental decisions regarding the case, [such as] whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. at 751; *see id.* at 750-54. It follows that defaults that have the effect of frustrating the defendant's decision on fundamental matters cannot be evaluated in the same manner as defaults arising from strategic decisions at trial or on appeal that are entrusted to the attorney.[37] Accordingly, the deliberate bypass standard remains applicable to those fundamental decisions – like deciding whether to appeal – that can only be made by the defendant. *Sykes*, 433 U.S. at 92-94 (Burger, C.J., concurring); *id.* at 92 (where "important rights h[a]ng in the balance of the *defendant's own decision*, . . . a waiver impairing such rights [must] be a knowing and intelligent decision by the defendant himself"). A lawyer's strategic decisions or inadvertent mistakes cannot interfere with decisions that were never his to make.

Applying the deliberate bypass standard here, it is plain that Coleman has not defaulted.[38] It is beyond

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[37] In each case in which the Court has applied the cause and prejudice standard to a failure to raise a particular issue on appeal, it has emphasized the attorney's responsibility for the decision at issue. *See, e.g., Carrier*, 477 U.S. at 492; *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982) (applying cause and prejudice to inadvertent as well as strategic failure to raise particular issues at trial); *Smith v. Murray*, 477 U.S. at 534-36 (applying cause and prejudice standard to failure to raise constitutional claim on appeal); *Reed v. Ross*, 468 U.S. 1, 15-16 (1984) (applying cause and prejudice standard to failure to raise novel constitutional argument).

[38] It is irrelevant from the perspective of federal habeas review whether the failure to appeal occurred on direct or

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dispute that Coleman did not knowingly and intelligently waive his right to seek state appellate review of his federal constitutional claims. Coleman should not lose the right to have a federal habeas court review those claims simply because his state habeas counsel could not get a notice of appeal filed on time.

## CONCLUSION

For the foregoing reasons, Petitioner Roger Keith Coleman respectfully requests that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed and the cause be remanded to the Fourth Circuit for further proceedings.

Respectfully submitted,

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collateral review. *Carrier*, 477 U.S. at 489-91. In either case the result is the same: because of one misstep, all further state and federal review is extinguished. Indeed, in Virginia, where certain fundamental constitutional claims may be litigated only in post-conviction review, there can be no distinction between the failure to take a direct appeal and the failure to take a habeas appeal.

No. 89-7662

In The

# Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

*Petitioner,*

v.

CHARLES E. THOMPSON, WARDEN,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

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## QUESTIONS PRESENTED

I. WHEN THE SUPREME COURT OF VIRGINIA EXPRESSLY GRANTED THE COMMONWEALTH'S MOTION TO DISMISS PETITIONER'S STATE HABEAS CORPUS APPEAL, AND THE MOTION WAS BASED *SOLELY* ON PETITIONER'S UNTIMELY NOTICE OF APPEAL, DOES *HARRIS V. REED*, 489 U.S. 255 (1989), PRESENT ANY OBSTACLE TO ENFORCEMENT OF THE PROCEDURAL DEFAULT DOCTRINE?

II. DOES THE "DELIBERATE BYPASS" TEST HAVE ANY APPLICATION IN THE CONTEXT OF A PROCEDURAL DEFAULT WHICH OCCURRED DURING A STATE *COLLATERAL* APPEAL?

III. CAN A PETITIONER SUCCESSFULLY ASSERT ATTORNEY ERROR AS "CAUSE" FOR A DEFAULT WHICH OCCURRED DURING STATE HABEAS CORPUS PROCEEDINGS WHERE HE HAD NO CONSTITUTIONAL RIGHT TO COUNSEL BUT WAS REPRESENTED BY THREE ATTORNEYS OF HIS OWN CHOOSING?

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No. 89-7662

In The

# Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

*Petitioner,*

v.

CHARLES E. THOMPSON, WARDEN,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF ON BEHALF OF RESPONDENT

## STATEMENT OF THE CASE

On March 18, 1982, after a four-day trial, a jury in the Circuit Court of Buchanan County, Virginia, convicted the petitioner, Roger Keith Coleman, of the rape and capital murder of his sister-in-law, Wanda McCoy.[1] For the rape

[1] Coleman killed his victim by inflicting a "slash wound" to her throat which severed the right carotid artery, jugular vein, and larynx. There were two stab wounds to the victim's chest, one of which penetrated the heart and lung but was inflicted after the victim's death. The other penetrated the victim's liver and was inflicted after death or close to the time of death. Coleman has a blood type possessed by only ten

(Continued on following page)

conviction, the jury fixed Coleman's punishment at life imprisonment. The next day, after a separate hearing on the issue of punishment for the capital murder conviction, the jury fixed a sentence of death.[2] On April 23, 1982, the trial court imposed the death penalty in accordance with the jury's verdict. The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia on September 9, 1983. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). This Court denied a petition for a writ of certiorari on March 19, 1984. *Coleman v. Virginia*, 465 U.S. 1109 (1984).

Represented by attorneys of his own choosing, Coleman then filed a petition for a writ of habeas corpus in Buchanan County Circuit Court on April 26, 1984. On November 12-13, 1985, an evidentiary hearing was conducted. In a letter opinion dated June 23, 1986, the circuit court rejected Coleman's claims (J.A. 3-15), and in an order signed on September 4, 1986, entered final judgment. (J.A. 16-19). Petitioner's counsel received a copy of the dismissal order no later than September 11, 1986. (See Cert.Ptn. No. 87-5448 at 4; copies lodged with this Court).

Coleman's three attorneys filed a notice of appeal in the circuit court on October 7, 1986. (J.A. 28-33). Then, on

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percent of the population. Sperm found in the victim's vagina emanated from someone with the same blood type as Coleman's, two hairs found on the victim's pubic area matched Coleman's pubic hair, and blood matching the victim's type was found on Coleman's blue jeans. Coleman also admitted to a fellow jail inmate that he had raped the victim.

[2] Coleman had committed an attempted rape in 1977 and had been sentenced to three years in the penitentiary for that offense. In recommending the death sentence, the jury found that Coleman presented a future danger to society *and* that his offense was "outrageously or wantonly vile" in that it involved torture, depravity of mind, and aggravated battery to the victim. *See* Va. Code § 19.2-264.2.



October 25, 1986, they filed a motion requesting the circuit court to "correct" the date of final judgment from September 4, 1986 to September 9, 1986. In an order dated November 10, 1986, however, the circuit court denied the motion, stating that "final judgment in this case was entered on September 4, 1986 and . . . the records of this Court correctly reflect that fact at the present time." (J.A. 20).

On December 3, 1986, Coleman's attorneys filed a petition for appeal in the Virginia Supreme Court. On December 9, 1986, the Commonwealth filed a motion to dismiss Coleman's appeal based upon the fact that his notice of appeal had been untimely filed. (J.A. 22-24). By an order dated May 19, 1987, the Virginia Supreme Court expressly granted the motion and dismissed Coleman's petition for appeal. (J.A. 25-26). On June 2, 1987, Coleman filed a petition for rehearing which was denied on June 12, 1987. (J.A. 27).

Coleman filed a petition for a writ of certiorari in this Court on September 10, 1987. The petition was denied on October 19, 1987. *Coleman v. Bass*, 484 U.S. 918 (1987).

Coleman then filed his federal habeas corpus petition in the United States District Court for the Western District of Virginia on April 22, 1988. After extensive briefing, the district court heard oral argument on September 19, 1988. In a sixteen-page opinion dated December 6, 1988, Judge Glen M. Williams concluded that most of Coleman's claims were procedurally barred by his default during the state habeas appeal. (J.A. 36-39). Nevertheless, the district court also reviewed the merits of those claims, as well as the others which Coleman had raised in his petition, and concluded that Coleman was not entitled to federal habeas relief. (J.A. 39-52).

A unanimous panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on January 31, 1990. *Coleman v. Thompson*,

895 F.2d 139 (4th Cir. 1990). (J.A. 53-68). Unlike the district court, the Fourth Circuit relied primarily upon Coleman's procedural default during his state habeas appeal. (J.A. 55-64). The court, however, also reviewed the merits of petitioner's claims which challenged the constitutional adequacy of the penalty-stage instructions to the jury and found those claims lacking. (J.A. 64-68). Coleman's petition for a rehearing en banc was denied on February 27, 1990. (J.A. 69).

This Court granted certiorari on October 29, 1990. *See* 111 S.Ct. 340 (1990).



## SUMMARY OF ARGUMENT

### I

*Harris v. Reed* and its "plain statement" rule must be applied with a reasonable measure of common sense, and the Court of Appeals did so in this case. Nothing in *Harris* undermines the indisputable fact that Coleman's state habeas appeal was dismissed *solely* because he violated a mandatory and jurisdictional rule of Virginia appellate procedure.

When Coleman failed to file a notice of appeal within thirty days after entry of the judgment dismissing his state habeas petition, he thereby deprived the Supreme Court of Virginia of the jurisdiction to determine his constitutional claims. *See* Va.S.Ct. Rule 5:9(a). *Harris'* "plain statement" requirement, if applicable at all, was clearly satisfied: (1) there is no basis for concluding that the Virginia Supreme Court's dismissal of Coleman's habeas appeal was premised upon federal law; (2) the state court expressly granted the Commonwealth's motion to dismiss which was based *solely* on procedural grounds; and (3) Coleman has admitted repeatedly that the state appellate court refused to reach the merits of his federal claims because of his procedural default.

### II

This Court need not decide whether the "deliberate bypass" test still applies in the factual situation presented in *Fay v. Noia*, 372 U.S. 391 (1963), because Coleman's default occurred during a civil collateral appeal – a fundamentally different situation than *Fay*, where the default occurred on direct appeal from a criminal conviction. This basic distinction most clearly manifests itself in the twin principles that state collateral proceedings are not constitutionally required and that, unlike a defendant on

direct appeal, a state habeas petitioner has no constitutional right to the effective assistance of counsel.

Nevertheless, the "cause and prejudice" standard established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), should apply to all procedural defaults, regardless of the stage at which the default occurred or whether counsel's error resulted in a partial or total default. *Fay*'s inherently subjective and internal "deliberate bypass" test is woefully inadequate to safeguard the vital interests of finality and comity which are the foundation of *Sykes* and its progeny.

III

An alleged error by state habeas counsel can never constitute "cause" for a procedural default. Any other conclusion would be antithetical to the very principles that inform the "cause and prejudice" standard, and would release an endless stream of state and federal litigation challenging the "effectiveness" of previous habeas counsel's performance.

In the absence of a constitutional right to counsel and the corollary right to the effective assistance of counsel, "cause" must be both objectively verifiable and external to the petitioner. Thus, where a default results from state habeas counsel's late filing of a notice of appeal, "cause" cannot be established.

Coleman must bear the burden of the default caused by the team of lawyers he chose to represent him. If such a burden had fallen upon one who was "actually innocent," however, the "miscarriage of justice" safety valve would have been applicable and would have provided relief. But where, as here, there can be no substantial claim of "actual innocence," there is simply no constitutional justification for requiring the Commonwealth to assume responsibility for a default over which it had no control.



IV

The "new rule" doctrine greatly, and beneficially, simplifies federal habeas corpus proceedings by cutting through the complexities of issues such as procedural default, and by declaring federal habeas relief "off limits" if the petitioner is asking the federal court to apply or announce a "new rule." The focus of the "new rule" doctrine is exactly where it should be: on the reasonableness of a state court's rejection of federal claims at the time a petitioner's conviction became final.

Here, all of Coleman's federal claims were reasonably rejected by the state habeas judge, and the district court's concurrence in that conclusion amply demonstrates that none of Coleman's proposed "new rules" can be announced in this collateral proceeding. Thus, even if Coleman's procedural default were completely ignored, federal relief would remain unavailable to him.

## ARGUMENT

I

### THE "PLAIN STATEMENT" RULE IS EITHER INAPPLICABLE TO THIS CASE OR HAS BEEN FULLY SATISFIED.

In *Harris v. Reed*, 489 U.S. 255 (1989), this Court extended application of the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), from direct appeal cases to federal habeas corpus. *Harris*, 489 U.S. at 263. Coleman contends that the Virginia Supreme Court's order dismissing his state habeas appeal failed to satisfy the "plain statement" requirement, and he asserts that the state court might have denied his federal constitutional claims on the merits.[3] There are a number of compelling reasons, however, for rejecting this contention.

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[3] In his petition for certiorari, Coleman argued that because "[n]othing in the order specified that the dismissal

(Continued on following page)

## A

## THE "PLAIN STATEMENT" RULE IS INAPPLICABLE WHERE, AS HERE, IT CANNOT FAIRLY BE SAID THAT THE STATE COURT RESTED ITS DECISION PRIMARILY ON FEDERAL LAW.

While it certainly is clear that in *Harris* this Court extended the applicability of *Long*'s "plain statement" rule to cases on habeas review, it is equally clear that the Court did not intend to change, or make more strict, the rule which the Court had articulated in *Long*. *See Harris*, 489 U.S. at 265 ("[W]e are not persuaded that we should depart from *Long* . . . simply because this is a habeas case."). It is, therefore, essential to focus upon exactly how this Court stated the rule in *Long* and how the *Harris* Court understood *Long*'s "plain statement" rule.

Justice O'Connor stated the *Long* rule for the Court in the following manner:

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was granted on procedural default grounds" the motion to dismiss "might well have been granted because the [Virginia Supreme Court] found the petition to be without substantive merit." (See Cert. Ptn. at 22-23). Curiously, Coleman now argues that the state court's dismissal order allows only two possible interpretations, both of which conclude that the appeal was dismissed "as untimely." (Pet. Br. 9). And Coleman now expressly concedes that the dismissal was not "directly on the federal merits." (Pet. Br. 9 n.2). While the Commonwealth maintains that Coleman's appeal was dismissed *solely* on procedural grounds, if it is undisputed that the appeal was dismissed "as untimely," and if the Virginia Supreme Court reached the merits of Coleman's federal claims only as an alternative basis for its ruling, *Harris v. Reed* was clearly satisfied. *See* 489 U.S. at 264 n.10 ("state court need not fear reaching the merits of a federal claim in an *alternative* ruling") (emphasis in original).



> [W]hen, as in this case, a state court decision *fairly appears to rest primarily on federal law, or to be interwoven with the federal law,* and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

*Long*, 463 U.S. at 1040-1041 (emphasis added). *See also id.* at 1044 ("[I]t fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law."); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law. . . . ' ").

And, in *Harris*, this Court did not in any way depart from this articulation of the rule:

> Under *Long, if "it fairly appears that the state court rested its decision primarily on federal law,"* this Court may reach the federal question on review unless the state court's opinion contains a " 'plain statement that [its] decision rests upon adequate and independent state grounds.' "

*Harris*, 489 U.S. at 261, *quoting Long*, 463 U.S. at 1042 (emphasis added). It is readily apparent, therefore, that in *Long, Caldwell* and *Harris* this Court recognized that the condition precedent for requiring compliance with the "plain statement" rule is that it must "fairly appear that the state court rested its decision primarily on federal law." *See also Pennsylvania v. Finley*, 481 U.S. 551, 563 (1987) (Brennan, J., dissenting) ("There is no need for a plain statement indicating the independence of the state grounds since there was no federal law interwoven with this determination."). This understanding of the "plain statement" rule has continued even in the aftermath of *Harris*. *See Illinois v. Rodriguez*, 110 S.Ct. 2793, 2798 (1990);

*Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2701 n.1 (1990); *Quinn v. Millsap*, 109 S.Ct. 2324, 2328-2329, n.6 (1989).

In *Long*, *Caldwell*, *Harris* and *Rodriguez*, the state courts had expressly discussed and decided the merits of the prisoners' federal claims. *See Long*, 463 U.S. at 1043-1044; *Caldwell*, 472 U.S. at 328; *Harris*, 489 U.S. at 258; *Rodriguez*, 110 S.Ct. at 2798. Under such circumstances, application of the "plain statement" rule had some basis in logic. In Coleman's case, however, the Virginia Supreme Court unambiguously granted the Commonwealth's motion to dismiss, a motion based *solely* upon Coleman's failure to comply with Virginia's mandatory and jurisdictional requirement of a timely notice of appeal. (J.A. 22-24).

The state court's decision at issue here neither discussed nor purported to decide Coleman's federal claims, and there is no reasonable basis for a conclusion that the state court's ruling "rested . . . primarily on federal law."[4] Thus, the condition precedent required for invocation of the "plain statement" rule simply does not exist in this case.

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[4] Coleman emphasizes the fact that the Virginia Supreme Court's dismissal order recited all the pleadings and briefs which the parties had filed before the court granted the Commonwealth's motion to dismiss. (J.A. 25). According to Coleman, the fact that the order stated, "Upon consideration whereof, the motion to dismiss is granted . . . " (J.A. 26), means that the Virginia Supreme Court "considered" the merits of his federal claims. (Pet. Br. 7, 18). This argument reduces the "plain statement" rule to an absurdity. The question is whether the Virginia Supreme Court *decided* the merits of Coleman's federal claims, *not* whether it merely read Coleman's merits brief or thought about the merits of his claims. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (state ground not "independent" where state court expressly rejected merits of federal claim and then applied default rule which was totally "depend[ent] on an antecedent ruling on federal law").



**B**

**WHEN THE VIRGINIA SUPREME COURT GRANTED THE COMMONWEALTH'S MOTION TO DISMISS COLEMAN'S STATE HABEAS APPEAL, AND THE MOTION WAS BASED *SOLELY* UPON COLEMAN'S UNTIMELY NOTICE OF APPEAL, THE "PLAIN STATEMENT" RULE WAS FULLY SATISFIED.**

Even if the "plain statement" rule were applicable here, Coleman's reliance on *Harris v. Reed* would still be misplaced. The problem that this Court faced in *Harris* – a state court order which both of the lower federal courts had found to be "ambiguous" on the issue of procedural default – simply is not present here.

As was the case in both *Long*, 463 U.S. at 1043-1044, and *Caldwell*, 472 U.S. at 328, the state court in *Harris* had expressly discussed and resolved the merits of the petitioner's federal constitutional claims. *See Harris*, 489 U.S. at 258. Thus, an issue arose in all three cases as to whether the state courts' brief references to an adequate and independent state ground for denying relief constituted a procedural bar to federal review.[5]

Both the district court and the court of appeals in *Harris* had found that the state court's reference to procedural default was ambiguous. This fact is essential to an understanding of this Court's decision in *Harris*.

Immediately after reciting the lower courts' findings, this Court framed the issue as "whether a state court's

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[5] In *Long*, the reference was to the provisions of the Michigan Constitution. 463 U.S. at 1037 n.3. In *Caldwell*, there was a "cryptic" reference to a procedural bar concerning appellate issues not raised in an assignment of error. 472 U.S. at 327. And in *Harris*, the Illinois appellate court had "referred to the 'well settled' principle of Illinois law that 'those issues which could have been presented [on direct appeal], but were not, are considered waived.' " 489 U.S. at 258.

ambiguous invocation of a procedural default bars federal habeas review." *Harris*, 489 U.S. at 259-260 (footnote omitted). And, when later discussing the problem of "state court opinions that are unclear" on the issue of whether the state court has actually enforced a procedural default, the Court expressly stated that "[i]n this case for example, both the District Court and the Court of Appeals found the Illinois Appellate Court's opinion ambiguous on this point." 489 U.S. at 262, n.8. *See also id.* at 275 n.1 (Kennedy, J., dissenting) ("[t]he presence of an ambiguity on this point is a logical antecedent to the application of the Court's rule.").

Whether a state court which has expressly resolved the merits of a petitioner's federal claims has also rested its decision on procedural default grounds is clearly a question of historical fact. And, where both lower federal courts have resolved that issue, as in *Harris*, by determining that the state court had not clearly enforced a procedural bar, this Court understandably accepts those findings. *See generally Anderson v. Bessemer*, 470 U.S. 564, 573-576 (1985) (describing "clearly erroneous" standard). *See also Harris*, 489 U.S. at 275 n.1 (Kennedy, J., dissenting) ("reasonable reading of the majority's opinion" is that Court treated existence of ambiguity "as a question determined . . . below" which the Court was "not inclined to revisit"). Not surprisingly, then, this Court held in *Harris* that a state court opinion which is "ambiguous" on the issue of procedural default is insufficient to bar federal review. *Harris*, 489 U.S. at 266. Coleman's case, however, is nothing like *Harris*.

It is undisputed here that the Virginia Supreme Court expressly granted the Commonwealth's motion to dismiss (J.A. 26) and that the motion was based *solely* on the fact that Coleman's notice of appeal was untimely. (J.A. 22-24). And, unlike the situations in *Long*, *Caldwell* or *Harris*, the Virginia Supreme Court never discussed or decided the merits of Coleman's federal claims. *See*



*Harris*, 489 U.S. at 266 n.13 (pointing out that what made the state court's reference to procedural default "ambiguous" was the fact that the court "clearly went on to reject the federal claim on the merits"). Indeed, any conceivable doubt about the clarity of the Virginia Supreme Court's ruling evaporated when the court rejected Coleman's petition for rehearing, which was an unequivocal effort to convince the court to reconsider its default ruling and reach the merits of his claims. (See Argument IC, *infra*, at 18).

Neither the district court nor the Fourth Circuit found that the Virginia Supreme Court's actions were ambiguous. To the contrary, the Court of Appeals found that:

> The Supreme Court [of Virginia] complied with the "plain statement" rule that *Harris* made applicable to habeas corpus proceedings. *The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal.* The Court recites that it considered all of the papers filed by the parties. *The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.*

(J.A. 57, emphasis added).

This case, therefore, is the exact opposite of the situation in *Harris*. Here, both of the lower federal courts found, *not* that the state court order was ambiguous, but that the state court had clearly dismissed Coleman's petition for appeal for reasons of procedural default. Under no stretch of the imagination can these findings be deemed "clearly erroneous."[6]

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[6] Indeed, even if it were not self-evident that the granting of a motion to dismiss based solely on procedural default grounds was a clear invocation of a state's default rules, the lower courts' findings would be adequately supported by

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Coleman contends, in effect, that the Fourth Circuit erred in applying *Harris* because the face of the Virginia Supreme Court's order does not recite that the Commonwealth's motion to dismiss was based upon Coleman's untimely notice of appeal. (Pet. Br. 10-11). Surely there is nothing in *Harris* that requires federal courts to take such a myopic view.

Even if Coleman had been unwilling to admit the indisputable, a cursory review of the three-page motion to dismiss demonstrates that it was premised entirely upon petitioner's late notice of appeal. (J.A. 22-24). Thus, the sort of time-consuming examination of the state court record which the Court sought to avoid in *Harris* is simply not implicated here. *See Harris*, 489 U.S. at 264-265.

Nor is there any reason why either the district court or the Court of Appeals should have been required to ignore its intimate familiarity with elementary principles of Virginia law. In fact, this Court has often emphasized the importance of deference to a construction of state law concurred in by both lower federal courts. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

It is true, of course, that *Harris* sought to relieve federal courts from having "to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *See Harris*, 489 U.S. at 265. In Coleman's case, however, no "extensive" analysis of Virginia law is necessary.[7]

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Coleman's numerous concessions that the state court had refused to reach the merits of his constitutional claims. (See Argument IC, *infra*, at 17-19).

[7] This case is a good example of why, despite *Harris*, federal habeas courts will be unable to avoid delving into the

(Continued on following page)



Moreover, the procedural bar in this case was not merely "potentially applicable;" it was mandatory and jurisdictional.

Virginia Supreme Court Rule 5:9(a) is unmistakably clear: "No appeal shall be allowed unless, within 30 days after entry of final judgment . . . , counsel for the appellant files with the clerk of the trial court a notice of appeal. . . . " This rule has long been held to be both

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details of the states' various procedural default rules. Even if a state court satisfies the "plain statement" rule, federal petitioners will invariably assert, as Coleman does here (Pet.Br. 16 n.9), that the state ground is not "adequate." As Justice Kennedy pointed out in his *Harris* dissent, determining the "adequacy" of the state procedural bar already "requires [the Court] to conduct extensive reviews of questions of state procedural law. . . . " *See* 489 U.S. at 277 (Kennedy, J., dissenting). Likewise, as Justice O'Connor pointed out in her concurrence, despite *Harris*, federal courts must continue to review state procedural default rules in the context of defaulted claims that were never presented to the state courts. *See* 489 U.S. at 269-270 (O'Connor, J., concurring), *citing Teague v. Lane*, 489 U.S. 288, 298 (1989), and *Engle v. Isaac*, 456 U.S. 107, 125-126, n.28 (1982). The goal of avoiding extensive reviews of the details of state procedural law was understandable in *Long* because that case was a *direct* appeal where this Court was the first and only federal court to address such state law matters. *See Long*, 463 U.S. at 1039 ("[E]xamining state law is unsatisfactory because it requires us to interpret state laws *with which we are generally unfamiliar*") (emphasis added). But this same goal is both futile and unnecessary in the context of habeas corpus cases: futile because federal courts will ultimately be required to analyze state procedural rules anyway; and unnecessary because, unlike this Court, the lower federal courts are presumed "experts in matters of local law and procedure." *See Harris*, 489 U.S. at 283 (Kennedy, J., dissenting) (listing various contexts in which this Court has justifiably relied on lower federal courts' expertise in matters of state law).

mandatory and jurisdictional. *See Vaughn v. Vaughn*, 215 Va. 328, 329, 210 S.E.2d 140, 142 (1974); *Mears v. Mears*, 206 Va. 444, 445, 143 S.E.2d 889, 890 (1965). The 30-day time limit cannot be extended. *See* Va.S.Ct.R. 5:5(a).

The Commonwealth's motion to dismiss Coleman's state habeas appeal was clearly based upon these mandatory procedural rules. (J.A. 22-24). Both the district court and the Fourth Circuit correctly recognized that, when the Virginia Supreme Court expressly granted the motion to dismiss, it was doing precisely what it was *required* to do under Virginia law.[8] *See School Bd. of Lynchburg v. Caudill Rowlett Scott*, 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989) ("This Court . . . lacks jurisdiction to entertain the appeal on its merits because no notice of appeal was filed . . . within 30 days . . . as required by Rule 5:9"). *See also Towler v. Commonwealth*, 216 Va. 533, 535, 221 S.E.2d 119, 121 (1976) ("dismissal will continue to be the price of failure to comply with mandatory rule provisions").

Certainly, if *Harris* had been decided at the time the state court acted on Coleman's petition, the court could have taken this Court's suggestion and included express language that relief was being "denied for reason of procedural default." *See Harris*, 489 U.S at 265 n.12. But *Harris* was still almost two years in the offing when the state court acted in this case. Under these circumstances,

[8] The courts below also were entitled to rely upon the elementary principle of Virginia law that when the Virginia Supreme Court affirms the decision of the trial court, it "refuses" the petition for appeal. *See Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1974). *See also Smith v. Murray*, 477 U.S. 527, 532 (1986), *citing Smith v. Morris*, 221 Va. cxliii (noting disposition of state habeas appeal as "appeal refused"). Thus, the "dismissal" of Coleman's petition for appeal was a clear and unmistakable indication that the state court had enforced its default rule. *See Mears*, 206 Va. at 449, 143 S.E.2d at 892 (appeal "dismissed" for late notice of appeal).



reaching the merits of Coleman's federal claims because the state court failed to include "magic words" in its order would further none of the interests that *Harris* was intended to foster, but *would* do substantial harm to the interests of finality and comity that underlie the procedural default doctrine.[9] *Cf. Long*, 463 U.S. at 1044 n.10 (pertinent to inquire whether it is "unfair" to require a " 'plain statement' *in this case*") (emphasis added).

Nothing can be gained by the type of blind, mechanical application of *Harris* proposed by Coleman. As demonstrated below, everyone in this case, *including Coleman*, has known from the moment the Virginia Supreme Court dismissed his habeas appeal that the court did so for one reason and one reason only: his untimely notice of appeal.

## C

## COLEMAN'S NUMEROUS UNEQUIVOCAL CONCESSIONS THAT THE VIRGINIA SUPREME COURT NEVER REACHED THE MERITS OF HIS CLAIMS PRECLUDES HIM FROM ASSERTING THAT THE "PLAIN STATEMENT" RULE WAS NOT SATISFIED.

Throughout his federal habeas corpus proceedings, Coleman has taken the disingenuous position that the Supreme Court of Virginia might have rejected his claims on the merits when it dismissed his state habeas appeal. Before he embarked on federal habeas, however, Coleman took the opposite position both in the Virginia Supreme Court and in this Court: that the state court had denied

[9] Coleman's feigned solicitude for these interests (Pet. Br. 18-19) cannot mask the fact that the basic thrust of his argument is that this Court should assume that the Virginia Supreme Court ignored its own mandatory and jurisdictional rule. Reaching such an unsupported conclusion could only frustrate the interests of finality and comity.

him due process by dismissing his case on procedural grounds and by refusing to reach the merits of his claims.

Immediately after the Virginia Supreme Court dismissed his state habeas appeal, for example, Coleman filed a petition for rehearing wherein he repeatedly asked the court to reconsider its decision dismissing his appeal on procedural grounds and requested the court to decide his claims on the merits. (Va.S.Ct. Pet.Rhrg. at 1, 17, 20; copies lodged with this Court). Coleman then asked the Virginia Supreme Court to stay the execution of its judgment while he sought a writ of certiorari in this Court to review the *"dismissal of his habeas corpus appeal without consideration of the merits of that appeal,"* and he asserted that his state habeas appeal had been "recently dismissed . . . *without any consideration of the merits.*" (Va.S.Ct. pleading dated 7-6-87 at ¶¶1, 3 (emphasis added); copies lodged with this Court).

Coleman's forthrightness continued in the 1987 certiorari petition he filed in this Court. Indeed, the whole thrust of his petition was to persuade this Court that the Virginia Supreme Court had denied him due process by refusing to reach the merits of his federal claims.

For instance, Coleman contended that "[u]nder the Supreme Court of Virginia's novel interpretation, petitioner's notice of appeal was one day late [and that] *[o]n this basis alone*, the Court summarily dismissed Coleman's petition for appeal." (See Cert.Ptn. No. 87-5448 at 3; emphasis added). He then asserted that the Virginia Supreme Court had "deprived [him] of his due process right to have that Court fairly decide the merits of his petition for appeal" and that his case presented this Court with an "important opportunity" to decide whether a state court may "refuse to consider federal constitutional claims." (*Id.* at 7). He assured this Court that his petition presented "substantial federal constitutional claims . . . that the Virginia [Supreme Court] . . . declined to review because of a novel retroactive



interpretation of Rule 5:9" and that the state court had "dismissed [his] petition for appeal as untimely." (*Id.* at 9, 14). And then, finally and most tellingly, Coleman asked this Court to "remand [his case] to the Supreme Court of Virginia, directing that court to consider [his] petition for appeal *on the merits.*" (*Id.* at 18, emphasis added).

When a petitioner has repeatedly stated on the record, both in this Court and elsewhere, that the state court never reached the merits of his claims because it dismissed his appeal for reasons of procedural default, it would be ironic indeed for this Court to hold that the federal courts may reach the merits of those same claims because the "plain statement" rule was not satisfied. If the procedural default basis of the Virginia Supreme Court's ruling was clear enough to Coleman that he could premise a certiorari petition upon that court's refusal to decide the merits of his federal claims, then it surely was "plain" enough to satisfy any reasonable demands of the "plain statement" rule.

## II

## THE "CAUSE AND PREJUDICE" STANDARD, RATHER THAN THE "DELIBERATE BYPASS" TEST, GOVERNS COLEMAN'S DEFAULT DURING HIS STATE HABEAS CORPUS APPEAL.

### A

### THE "DELIBERATE BYPASS" TEST MUST BE STRICTLY CONFINED TO THE FACTS OF *FAY V. NOIA*.

This Court held in *Murray v. Carrier*, 477 U.S. 478 (1986), that the "cause and prejudice" standard applies fully to the procedural default of a particular claim on direct appeal. The Court, however, expressly reserved the issue "as to whether counsel's decision not to take an appeal at all might require treatment" under the "deliberate bypass" test set forth in *Fay v. Noia*, 372 U.S. 391

(1963). *See Carrier*, 477 U.S. at 492. Coleman contends that his case now requires the Court to decide that issue. This contention, however, ignores the basic distinction between a direct appeal, which was the context of *Fay v. Noia*, and a state collateral appeal, which is the context of the default at issue here.

When the Court reserved the "deliberate bypass" issue in *Carrier*, it expressly referred to the same issue which had been previously reserved in *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See Carrier*, 477 U.S. at 492. That issue was whether "the *Fay* rule" continued to apply "to the facts there confronting the Court." *Sykes*, 433 U.S. at 88 n.12. Thus, when *Carrier* and *Sykes* are read in conjunction, it is clear that if *Fay*'s "deliberate bypass" test has *any* remaining vitality it must be strictly confined to the facts of that case.

As Justice Harlan said in his lengthy dissent in *Fay*, that case "is one of the most disquieting that the Court has rendered. . . . " 372 U.S. at 448 (Harlan, J., dissenting). Justice Harlan's grave concerns about "a decision which finds virtually no support in more than a century of this Court's experience," *id.* at 463, eventually prevailed when *Sykes* and *Carrier* all but eliminated the "deliberate bypass" test. *See Sykes*, 433 U.S. at 87-91; *Carrier*, 477 U.S. at 485-492. While *Fay* may certainly deserve a final burial, no such service need be conducted here because, unlike *Fay*, Coleman's case does not involve a default on direct appeal.

The defendant in *Fay* "had allowed the time for a *direct* appeal to lapse without seeking review by a state appellate court." 372 U.S. at 394 (emphasis added). The *Fay* majority was willing to recognize only "a limited discretion" in the federal habeas courts to deny relief because of a procedural default in state court. 372 U.S. at 438. Such circumstances were limited to those "that can fairly be described as the deliberate by-passing of state procedures," 372 U.S. at 439, and in the majority's view,



"Noia's reason for not appealing [did not] support an inference of deliberate by-passing of the state court system."[10] *Id.*

In formulating the "deliberate bypass" test, the *Fay* majority expressly relied upon "[t]he classic definition of waiver" articulated in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *See Fay*, 372 U.S. at 439. That waiver standard, however, which requires "an intentional relinquishment or abandonment of a known right or privilege," clearly applies only to the waiver of "fundamental constitutional rights." *Johnson*, 304 U.S. at 464. Moreover, *Johnson* dealt with an accused's waiver of his personal constitutional right to be represented by counsel at trial. Neither *Johnson* nor *Fay* dealt with a petitioner's forfeiture of a non-constitutional "right" to litigate a collateral appeal. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970) ("Friendly") ("waiver" analysis inappropriate where state did not deprive one of something "to which he is constitutionally entitled").

While the decision whether to file the initial *direct* appeal as of right is so "fundamental" that a defendant cannot be bound by his attorney's decision not to appeal, *see Jones v. Barnes*, 463 U.S. 745, 751 (1983), and the first appeal as of right is so "fundamental" that a defendant has a right to the effective assistance of counsel at that stage, *see Evitts v. Lucey*, 469 U.S. 387, 396 (1985), this Court has clearly held that state *collateral* proceedings are

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[10] As Justice Harlan observed in his dissent, after creating the "deliberate bypass" test, the *Fay* majority proceeded to ignore it. *See* 372 U.S. at 471 (Harlan, J., dissenting). Even though Noia had personally elected, after consultation with counsel, not to pursue his direct appeal, his default was excused merely because his choice was influenced by the fact that, if he prevailed on appeal, he might face the death penalty upon retrial. 372 U.S. at 439-440.

not "fundamental" in any constitutional sense. *See Pennsylvania v. Finley*, 481 U.S. at 557 ("States have no obligation to provide this avenue of relief, . . . and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."). *See also id.* at 559 (petitioners on state habeas "are in a fundamentally different position [from defendants who are] at trial and on the first appeal as of right").

If a state is not constitutionally required to provide such proceedings, and if the Constitution does not require the right to counsel at such proceedings, then it hardly can be said that Coleman's right to petition the Virginia Supreme Court for an appeal from a *civil* habeas corpus judgment was a "fundamental" right that could not be defaulted in the absence of a deliberate personal decision not to appeal. *See Finley*, 481 U.S. at 556-557 ("Post conviction relief is even further removed from the criminal trial. . . . It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Fay*'s "deliberate bypass" test is thus, by definition, inapplicable to Coleman's default that occurred on state collateral appeal.

**B**

**THE "CAUSE AND PREJUDICE" STANDARD APPLIES REGARDLESS OF THE STAGE AT WHICH THE DEFAULT OCCURRED OR THE TYPE OF ATTORNEY ERROR WHICH RESULTED IN THE DEFAULT.**

Even at its inception, *Fay*'s "deliberate bypass" test was correctly recognized to be "wholly unsatisfactory" because "it amounts to no limitation at all." 372 U.S. at 470 (Harlan, J., dissenting). *See also* Friendly, *supra*, at 158 ("It is . . . difficult to imagine how the state could ever" meet such a standard). Indeed, Coleman asserts that he satisfied the "standard" merely because he had a "desire



to appeal." (Pet. Br. 8). Thus, even if it were assumed that the Commonwealth could not prevail unless *Fay* were laid to rest, this Court should reject the "deliberate bypass" test without hesitation.

*Carrier* established beyond question that the *Sykes* "cause and prejudice" standard applies to an *appellate* default even if the default resulted from counsel's ignorance, inadvertence or mistake. 477 U.S. at 489-492. This conclusion was dictated by the Court's recognition that federal review of defaulted claims exacts "considerable costs" to the interests of finality and comity and that those costs "do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision. . . . " *Carrier*, 477 U.S. at 487. *See also id.* at 491 ("[T]hese costs are imposed on the state regardless of the kind of attorney error that led to the procedural default").

Just as importantly, *Carrier* also recognized that "[a] State's procedural rules serve vital purposes at trial, on appeal, *and on state collateral attack*." 477 U.S. at 490 (emphasis added). Indeed, " '[e]ach State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.' " *Carrier*, 477 U.S. at 491, *quoting Reed v. Ross*, 468 U.S. 1, 10 (1984). Thus, the Court rightly concluded in *Carrier* that "the standard for cause should not vary depending on the timing of a procedural default. . . . " 477 U.S. at 491. *See also Smith v. Murray*, 477 U.S. 527, 533 (1986) ("concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure"). Because the "cause and prejudice" standard applies to defaults occurring on *direct* appeal, logic dictates that a more lenient standard should not be applied

to defaults occurring during a civil *collateral* appeal, which is even more attenuated from the criminal trial.[11]

Coleman's procedural default may have stemmed from counsel's ignorance, inadvertence or mistake, but his failure to file a timely notice of appeal no less deprived the Virginia Supreme Court of the jurisdiction to hear and determine his constitutional claims. Federal review of the merits of Coleman's defaulted claims under these circumstances would thus do at least as much injury to the interests of finality and comity as would have occurred if he had only defaulted a particular claim or claims. After all, an appeal is merely the sum total of the particular claims that an appellant chooses to raise. The fact that a default results in all of a litigant's claims being dismissed, rather than some or most of his claims, is of no import in deciding the proper standard to govern the default.

The "deliberate bypass" test, by requiring the government to show a knowing and intentional personal waiver, which even then can be ignored as it was in *Fay*, is manifestly incapable of protecting the legitimate state interests at stake when a petitioner defaults his claims during a state collateral appeal. That "standard" provides

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[11] Coleman does not dispute that the "cause and prejudice" standard generally applies to procedural defaults during state collateral proceedings. (Pet.Br. 29-30). Indeed, the courts of appeals that have considered the issue are unanimous in that conclusion. *See Arce v. Smith*, 889 F.2d 1271, 1272-1274 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2185 (1990); *Whitley v. Bair*, 802 F.2d 1487, 1500 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Ewing v. McMackin*, 799 F.2d 1143, 1150-1151 (6th Cir. 1986); *Morrison v. Duckworth*, 898 F.2d 1298, 1300 (7th Cir. 1990); *Simmons v. Lockhart*, 915 F.2d 372, 376 (8th Cir. 1990); *Anselmo v. Sumner*, 882 F.2d 431, 433 (9th Cir. 1989); *Pierre v. Shulsen*, 802 F.2d 1282, 1283 (10th Cir. 1986); *Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990).



no protection at all and could never be satisfied where the default stems from the late filing of a notice of appeal.

Indeed, recognition of the inherent fallacy of such a "standard" would surely encourage over-zealous habeas corpus counsel to deliberately fail to file timely notices of appeal, with full confidence that their illusory "default" would deprive the state habeas appellate courts of the opportunity to review their clients' claims, but without risking forfeiture of federal review. And, even where there is no such "sandbagging," the practical consequences of an inadvertent default are precisely the same – piecemeal review and the prospect of a retrial delayed to a much later date. These concerns are the very ones that informed this Court's decision in *Carrier*, and they require that the "cause and prejudice" standard, and that standard alone, govern Coleman's default.[12]

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[12] This conclusion is entirely consistent with the Court's decision in *Evitts*. There, the Court held that a state cannot deprive a criminal defendant of his initial direct appeal as of right merely because his attorney failed to perfect the appeal under the requirements of state law. 469 U.S. at 400. But that result had nothing to do with *Fay*, and indeed, *Fay* is not even mentioned in *Evitts*. Instead, the result in *Evitts* was dictated by the Court's conclusion that, because a defendant has a right to counsel during his first appeal as of right, he also has the right to *effective* counsel. 469 U.S. at 396. *Evitts*, therefore, fits neatly within the "cause and prejudice" standard. Under *Carrier*, ineffective counsel is "cause," 477 U.S. at 488, and therefore the prisoner in *Evitts* clearly satisfied that standard. But as *Evitts* itself recognizes, the right to effective counsel is totally dependent upon a constitutional right to counsel. 469 U.S. at 496 n.7. Thus, there is certainly nothing in *Evitts* which would require that the "deliberate bypass" standard be applied to a default that occurred during state collateral proceedings where there is no right to counsel, and consequently, no right to the effective assistance of counsel.

## III

## AN ERROR BY COUNSEL DURING STATE COLLATERAL PROCEEDINGS CANNOT CONSTITUTE THE "CAUSE" NECESSARY TO EXCUSE A PROCEDURAL DEFAULT.

### A

### WHERE, AS HERE, A PETITIONER CANNOT ESTABLISH "CAUSE" FOR HIS DEFAULT, THE "MISCARRIAGE OF JUSTICE" EXCEPTION PROVIDES ADEQUATE PROTECTION.

As a backdrop to the "cause" issue, it is important to remember that, in all but the most extraordinary of cases, prisoners who are true "victims of a fundamental miscarriage of justice" will be able to establish "cause." *Carrier*, 477 U.S. at 495-496 (citations omitted). A petitioner's inability to establish "cause" is thus a very strong indicator that he has not suffered a "miscarriage of justice."

Nevertheless, the Court has held that in that "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [a] procedural default." *Carrier*, 477 U.S. at 496. The exception "is a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris*, 489 U.S. at 271 (O'Connor, J., concurring).

Thus, a conclusion that "cause" for a default cannot be established by pointing to an alleged error by state habeas counsel would not mean that a state prisoner would have no protection against a fundamentally unjust conviction. No matter how badly such a prisoner, or his counsel, abused state procedural rules, he would remain free to bring his claims to federal court and to obtain federal relief if he can make a showing of actual innocence.



In an effort to make such a showing, Coleman has asserted only that he "has maintained his innocence from the outset." (See Cert. Reply Br. at 15 n.10). He also reminds the Court of his "steadfast insistence on his innocence." (Pet.Br. 3). But these bare assertions fall far short of the mark.

Even if his default during his state habeas appeal were overlooked, and the Court were to ignore his other defaults at trial and on appeal (J.A. 18-19, 41, 46, 49, 51, 64), the opinions of the state habeas judge and the district court judge demonstrate that all of Coleman's federal claims, including all of his ineffective counsel claims, are meritless.[13] (J.A. 3-15, 18-19, 39-52). His claims pertaining to the constitutionality of the penalty-stage jury instructions were also rejected on the merits by the Fourth Circuit. (J.A. 64-68). These facts demonstrate that Coleman cannot show the "actual prejudice" required under the "cause and prejudice" standard. *See Sykes*, 433 U.S. at 84, 90-91.

The Fourth Circuit, moreover, correctly concluded that the evidence presented at trial clearly identified Coleman as the person who had raped and killed his victim, and that the "miscarriage of justice" exception therefore was inapplicable. (J.A. 61-62). Under these circumstances, Coleman has received all of the protection to which he is constitutionally entitled, and there is no reasonable

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[13] In addition to rejecting Coleman's ineffective counsel claims (J.A. 42-45), the district court also rejected his claim concerning an allegedly biased juror. As the district court correctly concluded, the state habeas judge conducted a hearing on this claim and resolved the credibility issue in favor of the Commonwealth. (J.A. 39-41). The district court also rejected the merits of Coleman's allegations that the prosecution withheld exculpatory evidence. (J.A. 47-48).

probability that a constitutional violation has resulted in the conviction or sentencing to death of an innocent man.[14]

**B**

## THIS COURT'S PRIOR DECISIONS COMPEL THE CONCLUSION THAT A DEFECTIVE PERFORMANCE BY HABEAS COUNSEL IS NOT "CAUSE."

### 1. There is no constitutional right to counsel during state habeas corpus proceedings.

A convicted indigent defendant has a constitutional right to counsel on his first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963). This Court, however, has consistently held that such a right extends no further than the initial direct appeal.

More than fifteen years ago, the Court held that there is no constitutional right to counsel for a prisoner pursuing a discretionary appeal in state court or a writ of certiorari in this Court. *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). These twin conclusions were based upon the Court's recognition of the significant difference between an accused who "needs an attorney . . . as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence" and a convicted defendant who merely wants to file a discretionary appeal and use an attorney "as a sword to upset

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[14] This conclusion is corroborated by sophisticated genetic testing recently conducted *by Coleman's own retained expert*. Upon Coleman's insistence that such testing was necessary to prove his alleged innocence, the state trial court ordered the Virginia State Police to submit the vaginal specimens from the victim to Coleman's scientific expert in California for "PCR-DNA" analysis. Coleman's expert reported his findings in writing and concluded that the "primary sperm donor" had the same genotype as Coleman's, which occurs in only 2% of the population. (Copies lodged with this Court).



the prior determination of guilt." *Ross*, 417 U.S. at 610-611. Since *Ross*, there has been an unbroken line of cases limiting the constitutional right to counsel to the first appeal as of right.

In *Wainwright v. Torna*, 455 U.S. 586 (1982), for example, this Court expressly reaffirmed *Ross* and held that a Florida prisoner, whose petition for a writ of certiorari had been dismissed by the Florida Supreme Court because "the application was not filed timely," "had no constitutional right to counsel" at that discretionary stage of the state's appellate proceedings. 455 U.S. at 586-587.

In 1985, while reaffirming *Douglas* and holding that the constitutional right to counsel during the first appeal as of right included the right to effective counsel, *Evitts*, 469 U.S. at 396, the Court once again expressly noted that the considerations underlying a discretionary appeal are different. 469 U.S. at 396 n.7, *citing Ross* and *Torna*.

In 1987, the Court was confronted directly with the issue of whether there is a constitutional right to counsel during state collateral proceedings. After reviewing the reasons why it had always held that there is no constitutional right to counsel for a discretionary appeal, the Court concluded that "[t]hese considerations apply with even more force to post-conviction review" because:

> States have no obligation to provide this avenue of relief, . . . and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

*Finley*, 481 U.S. at 556-557 (citation omitted).

Then, just two terms ago, the Court expressly reaffirmed *Finley* and held that no different rule should apply with respect to the right to counsel during state habeas corpus proceedings in capital cases:

> We think that . . . the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral

> proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

*Murray v. Giarratano*, 109 S.Ct. 2765, 2770-2771 (1989) (footnote omitted); *see also Smith v. Murray*, 477 U.S. at 538 ("cause and prejudice" standard equally applicable in capital cases).

There is, therefore, no room for argument that the constitutional right to counsel extends beyond the initial direct appeal.[15] Coleman simply had no constitutional right to counsel during his habeas appeal to the Virginia Supreme Court.

**2. The right to effective assistance of counsel is totally dependent upon the existence of a constitutional right to counsel.**

While not taking issue with the substantive holdings of *Finley* and *Giarratano*, Coleman nevertheless contends that his state habeas counsel's performance was "ineffective" and that the "ineffective assistance" rendered by his attorneys should constitute "cause" for his procedural

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[15] Indeed, petitioner has expressly disavowed any intention of challenging *Finley* and *Giarratano*'s conclusion that there is "no constitutional right to post-conviction counsel." (Pet. Br. 23; see also Pet. Br. 34: "Petitioner does not seek to reargue *Giarratano*.").



default. (Pet.Br. 22-24, 34-35). This Court's prior decisions, however, establish beyond question that a constitutional right to counsel is an indispensable condition precedent to a finding of "ineffective assistance."

In *Torna*, for example, this Court held that "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application [for a writ of certiorari] timely." 455 U.S. at 587-588 (footnote omitted). And, in *Evitts*, the Court cited *Torna* with approval and stated expressly, "Of course, the right to effective assistance of counsel is dependent on the right to counsel itself." 469 U.S. at 369 n.7.

More recently, in *Finley*, this Court rejected a state prisoner's argument that her counsel's performance during state collateral proceedings was "ineffective" and therefore had violated her right under *Evitts* to the effective assistance of counsel:

> We think that *Evitts* provides respondent no comfort. . . . [T]he substantive holding of *Evitts* – that the State may not cut off a right to appeal because of a lawyer's ineffectiveness – depends on a *constitutional right to appointed counsel that does not exist in state habeas proceedings.*

*Finley*, 481 U.S. at 558 (emphasis added).

*A fortiori*, because Coleman did not have a right to counsel during his state habeas appeal, he had no right to effective assistance from the attorneys he chose to represent him.

**3. In the absence of a constitutional right to counsel and a violation of the right to effective assistance, the petitioner bears the risk of attorney error.**

The only way for Coleman to prevail, then, is for this Court to hold for the first time that an error by habeas counsel, which under no circumstances could constitute a

violation of a constitutional right to counsel, can nevertheless constitute "cause" for a procedural default. There are a number of compelling reasons for this Court *not* to effect such an extraordinary change in the law.

In *Carrier*, the issue was whether a criminal defendant or the state should bear the risk of inadvertent attorney error resulting in a procedural default during direct appeal. The Court resolved that issue by concluding:

> [T]he question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not *constitutionally* ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.

477 U.S. at 488 (emphasis added).

The essence of the Court's ruling in *Carrier* is that a habeas petitioner can establish "cause" for a procedural default by pointing to a defective performance by counsel if, and only if, counsel was *constitutionally* ineffective. For while "[i]neffective assistance of counsel . . . is cause for a procedural default," 477 U.S. at 488, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause . . . even when [the] default occurs on appeal rather than at trial." *Id.* at 492.

There can be no doubt, then, that the state cannot be forced to bear the risk of attorney error where the default occurred at proceedings at which the petitioner did not have a constitutional right to counsel or a constitutional right to the effective assistance of counsel. Contrary to Coleman's assertion that "[t]he existence of a constitutional right to counsel is irrelevant" to the existence of "cause" (Pet. Br. 23), this Court made clear in *Carrier* that where "the procedural default is the result of ineffective



assistance of counsel, [it is] the Sixth Amendment itself [that] requires the responsibility for the default [to] be imputed to the State. . . . " 477 U.S. at 488. *See also Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). Consequently, where there is no constitutional basis for imputing such responsibility to the state, the risk of attorney error must be borne by the petitioner.[16] *See Prihoda v. McCaughtry*, 910 F.2d 1379, 1386 (7th Cir. 1990) (Easterbrook, J.) ("[I]neffective assistance supplies 'cause' only when the Constitution requires the state to assure adequate legal assistance."). *Cf. Finley*, 481 U.S. at 556 ("it is the source of [the] right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question").

That conclusion is particularly appropriate in this case because Coleman cannot successfully assert even the vaguest notion of a "due process" violation as a basis for a finding of "cause." Not only did he have no constitutional right to counsel at the time of his procedural default, but the error was committed by attorneys of Coleman's own choosing; these were not attorneys who

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[16] It is true that in *Carrier* this Court cited "the right to the effective assistance of counsel" as "an additional safeguard against miscarriages of justice." *See* 477 U.S. at 496. But the Court did so only after stating its confidence that true "victims of a fundamental miscarriage of justice" will be able to establish "cause" and that those few who cannot will be able to obtain appropriate relief if they make a showing of actual innocence. *Id.* at 495-496. There is nothing in *Carrier*, however, that would support a conclusion that a petitioner can establish "cause" based upon an allegation of ineffective assistance where no right to effective assistance exists. *Cf. Pulley v. Harris*, 465 U.S. 37, 50 (1984), *explaining Zant v. Stephens*, 462 U.S. 862 (1983) (In *Zant*, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required").

in any sense were foisted upon Coleman by the Commonwealth, but were the same attorneys whom Coleman himself had chosen to institute his state habeas corpus proceedings.

In *Wainwright v. Torna*, the default occurred because the petitioner's retained counsel failed to perfect a timely discretionary appeal. 455 U.S. at 587. After rejecting Torna's claim that he had been denied the effective assistance of counsel, the Court also held:

> Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation – even if implicating a due process interest – *was caused by his counsel, and not by the State.* Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not timely filed did not deprive respondent of due process of law.

*Id.* at 588 n.4 (emphasis added). *See also Thomas v. Arn*, 474 U.S. 140, 155 (1985) (no due process violation where federal habeas appeal waived by counsel's failure to file objections to magistrate's report).

*Torna*, then, clearly demonstrates that, while the Court is generally unwilling to draw a distinction between the actions of appointed and retained counsel, *see, e.g., Evitts*, 469 U.S. at 395-396, such a distinction *is* relevant where there is no constitutional right to counsel at all – appointed or retained. Indeed, *Evitts* itself recognized that "[t]he constitutional mandate [guaranteeing the effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law." 469 U.S. at 396. The default in *Evitts* occurred on direct appeal where the defendant had a constitutional right to effective assistance, and the fact that the error had been committed by a retained attorney was thus constitutionally irrelevant.



In state habeas proceedings, however, a petitioner has no constitutional right to counsel. The state, moreover, is not attempting to obtain a criminal conviction, but is merely endeavoring to defend a presumptively valid state court judgment against a petitioner's collateral attack. Thus, in Coleman's case, where the error was committed by counsel of his own choosing at a proceeding where there was no constitutional right to counsel, there can be no plausible basis for a finding of the "state action" necessary to sustain a due process claim. Consequently, there likewise can be no plausible basis for a finding of "cause" or for imputing responsibility for Coleman's default to the Commonwealth.

**4. An error by habeas corpus counsel is not an "external factor" which prevented or impeded Coleman from complying with Virginia's procedural rules.**

Where counsel's performance does not violate a constitutionally mandated right to effective assistance, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show some *objective factor external to the defense* impeded counsel's efforts to comply with the State's procedural rule." *Carrier*, 477 U.S. at 488 (emphasis added). Coleman must thus show that an "external factor" somehow impeded his attorneys' efforts to file a timely notice of appeal in compliance with Virginia Supreme Court Rule 5:9.

In this context, Coleman has pursued two lines of attack. The first – that the procedural bar at issue is not an"adequate" state ground (Pet. Br. 16 n.9) – would, if successful, render a showing of "cause" unnecessary. His second argument, raised for the first time in this Court, is that by generally restricting the litigation of ineffective counsel claims to collateral proceedings where a petitioner has no constitutional right to counsel, Virginia somehow has erected an external impediment to his

assertion of those claims.[17] (Pet. Br. 37-39). Neither argument can withstand scrutiny.

**a. Failure to file a timely notice of appeal is clearly an "adequate" state ground.**

The "adequacy" of Virginia's mandatory rule concerning the timely filing of a notice of appeal cannot be seriously questioned. In fact, although the "adequacy" issue was raised and decided in the court below (J.A. 58-59), Coleman's petition for certiorari took no issue with the adequacy of the state procedural bar. The issue therefore cannot be resurrected now. *See Buchanan v. Kentucky*, 483 U.S. 402, 404 n.1 (1987) (Court refused to reach questions "not included as questions in the petition for certiorari"); Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").

Like the federal courts generally, and this Court in particular, the Virginia Supreme Court has a strong legitimate interest in defining its appellate jurisdiction with temporal certainty. Indeed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

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[17] The fact that ineffective counsel claims generally cannot be raised until collateral proceedings was never asserted in the Fourth Circuit as a basis for a finding of "cause." (See Pet. CA4 Br. at 25-28; CA4 Reply Br. at 5-6). In the court below, Coleman's assertion of "cause" was based primarily on the alleged right to counsel which this Court has since rejected in *Murray v. Giarratano*. Petitioner should not be permitted to rely on a "cause" theory never presented to the Fourth Circuit. *See Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987).



With respect to federal civil cases, both in the context of appeals and petitions for certiorari, this Court strictly enforces a mandatory and jurisdictional time limit. *See, e.g., Gabriel v. United States*, 429 U.S. 877 (1976) (untimely notice of appeal); *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1974) (untimely petition). *See generally* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, §§ 6.1(d) and 7.2(d) at 306, 403 (6th ed. 1986). In fact, Rule 13.3 of this Court expressly directs that "[t]he Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." The Virginia Supreme Court, like this Court, has a substantial interest in enforcing procedural bars such as the one at issue here.

Nor is there any merit to Coleman's contention that the bar was unfairly enforced under the facts of his case. There is nothing unfair about enforcing a filing deadline even when the filing is just one day late. *See Monger v. Florida*, 405 U.S. 958 (1972) (state court default premised on one-day-late notice of appeal is "adequate" to bar federal relief). *See also Torna*, 455 U.S. at 588 n.4 (state court dismissal of discretionary appeal because notice one day late did not deny due process); *Deal*, 402 U.S. at 962-964 (certiorari denied where petition filed one day late only because courier "lost all the papers").

In Coleman's case, the state habeas judge signed the dismissal order on September 4, 1986. (J.A. 19-20). Coleman, however, had known for more than two months since receiving the judge's June 23, 1986, opinion letter that the petition was going to be dismissed. (J.A. 3). Coleman's attorneys actually received the court's dismissal order no later than September 11, 1986. (See Cert.Ptn. No. 87-5448 at 4). Nevertheless, the notice of appeal was not filed until October 7, 1986, thirty-three days after judgment had been entered and at least

twenty-six days after receipt of the dismissal order.[18] (J.A. 33).

As the Fourth Circuit noted (J.A. 59), it has long been the law in Virginia that a judgment is "entered" when the order is signed by the trial judge. *See Peyton v. Ellyson*, 207 Va. 423, 430-431, 150 S.E.2d 104, 110 (1966) (habeas judgment entered when judge "signed the order"); *McDowell v. Dye*, 193 Va. 390, 394, 69 S.E.2d 459, 462-463 (1952) (judgment entered not when pronounced but on date order signed by judge). It has never been the law in Virginia that a judgment is not "entered" until it is physically recorded in the court's order book. *See Daley v. Commonwealth*, 132 Va. 621, 622-623, 111 S.E. 111 (1922) (time to file bill of exceptions in criminal case not extended by fact that order not recorded in order book until after judgment was entered).

Virginia strictly and consistently enforces its default rules.[19] *See, e.g., Whitley v. Bair*, 802 F.2d 1487, 1500 (4th

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[18] Coleman erroneously asserts that his notice of appeal would have been timely if he had sent it to the court by registered or certified mail. (Pet. Br. 4, 16 n.9). The so-called "mailbox" rule embodied in Virginia Supreme Court Rule 5:5(b) applies only to documents "required to be filed with the clerk of *this* Court," meaning the clerk of the Supreme Court of Virginia. The notice of appeal which Coleman failed to file in a timely manner is a document filed "with the clerk of the trial court," *not* the clerk of the Virginia Supreme Court. Va.S.Ct. Rule 5:9(a). There is no "mailbox rule" with respect to such documents and they must be actually received by the clerk of the trial court before the filing deadline passes. *See Mears*, 206 Va. at 445-446, 143 S.E.2d at 890.

[19] Coleman's argument to the contrary is so weak that he cannot, and does not, cite even a single case where the Virginia Supreme Court has excused an untimely notice of appeal. Indeed, the cases he *does* cite, *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970), and *O'Brien v. Mobil Oil*, 207 Va. 707, 152

(Continued on following page)



Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Conquest v. Mitchell*, 618 F.2d 1053, 1056 (4th Cir. 1980). This Court has also noted this fact. *See Smith*, 477 U.S. at 533; *Giarratano*, 109 S.Ct. at 2779 nn.14-15 (Stevens, J., dissenting). The default which Virginia's highest court has enforced in this case is exactly the same type of default that this Court and all federal appellate courts consistently enforce. *See, e.g., Thomas*, 474 U.S. at 155 (federal habeas appeal waived by failure to file objections); *Mann v. Lynaugh*, 840 F.2d 1194 (5th Cir. 1988) (federal capital habeas appeal dismissed where notice of appeal one day late). *See also Irwin v. Veterans Administration*, 59 U.S.L.W. 4021 (1990) (civil case properly dismissed where 30-day filing deadline violated). There is, therefore, no doubt that the default enforced in this case is "adequate" to bar federal review. *See Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989) (state ground "adequate" even where prisoner showed a "few cases" where state court had ignored default).

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S.E.2d 278, *cert. denied*, 389 U.S. 825 (1967), are both cases where the Virginia Supreme Court *enforced* its mandatory and jurisdictional rules. Of course, where a habeas petitioner can later show that he was denied his *constitutional* right to the effective assistance of counsel on direct appeal, he can obtain a delayed appeal. *See, e.g., Cabiniss v. Cunningham*, 206 Va. 330, 143 S.E.2d 911 (1965); *Thacker v. Peyton*, 206 Va. 771, 146 S.E.2d 176 (1966); and *Stokes v. Peyton*, 207 Va. 1, 147 S.E.2d 773 (1966). Indeed, in *O'Brien*, the Virginia Supreme Court expressly cited *Cabiniss*, *Thacker* and *Stokes* as examples where relief ultimately can be afforded despite a violation of a mandatory rule of appellate procedure. *See O'Brien*, 207 Va. at 714-715, 152 S.E.2d at 284. These cases, however, have no bearing on Coleman's case because his default occurred on collateral review, where he had no constitutional right to counsel.

**b. Coleman's default is unrelated to the fact that his ineffective counsel claims were being litigated on collateral review.**

The reason for petitioner's default is plain and simple: the team of attorneys he chose to represent him failed to file a timely notice of appeal as required by unambiguous state law. The default had absolutely nothing to do with the fact that ineffective counsel claims are generally litigated on collateral review.

As this Court has noted, " '[e]ach State's complement of procedural rules . . . *channel[s]*, to the extent possible, *the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.*' " *Carrier*, 477 U.S. at 491, *quoting Reed v. Ross*, 468 U.S. at 10 (emphasis added). Like most states, Virginia recognizes that ineffective counsel claims, which almost invariably deal with evidence not a matter of record at trial, are "most fairly and efficiently" litigated on collateral review where the record can be supplemented with trial counsel's explanation for his or her actions or omissions. *See Walker v. Commonwealth*, 224 Va. 568, 571, 299 S.E.2d 698, 699-700 (1983). *See also Kimmelman*, 477 U.S. at 378 ("an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings").

But the fact that Coleman could not raise his ineffective counsel claims until state habeas proceedings where he had no constitutional right to counsel obviously did nothing to impede his ability to raise such claims. Not only did he raise such claims in his state habeas petition, but the state habeas court afforded him a two-day evidentiary hearing devoted primarily to questioning the effectiveness of his trial attorneys. Coleman was represented throughout those proceedings by a team of attorneys of his own choosing, including members of a prestigious Washington, D.C., law firm, and he was permitted to cross-examine his trial attorneys extensively.



The same attorneys who represented him at the evidentiary hearing also represented Coleman on state habeas appeal. While it is true that counsel failed to file a timely notice of appeal, counsel's error was not, and could not have been, related to the fact that the ineffective counsel claims were being litigated on habeas corpus rather than on direct appeal. And Coleman's suggestion that the Commonwealth somehow "controlled" or "manipulated" his ability to litigate his claims is absurd. (Pet. Br. 38). In order to pursue his claims on habeas appeal, all Coleman and his attorneys had to do was follow Virginia's clear-cut mandatory and jurisdictional rule by filing a timely notice of appeal. The source of their failure to do so was not in any sense "objective" or "external," but was instead wholly subjective and internal. Under these circumstances, Coleman cannot demonstrate "cause" for his default.

## C

## SOUND REASONS SUPPORT THE CONCLUSION THAT AN ERROR BY HABEAS COUNSEL IS NOT "CAUSE."

**1. Accepting Coleman's definition of "cause" would result in a flood of litigation concerning the effectiveness of state habeas counsel.**

An already overburdened judicial system certainly does not need a stimulus for additional habeas corpus litigation and evidentiary hearings. Acceptance of petitioner's definition of "cause," however, would supply just such a stimulus.

If the alleged ineffectiveness of state habeas counsel could constitute "cause," then both the state and federal courts undoubtedly would be deluged with habeas petitions asserting that prior state collateral proceedings should be disregarded because of habeas counsel's defective performance. State court petitioners will assert that

procedural bars, such as that embodied in Virginia Code § 8.01-654 B 2,[20] should be ignored because prior habeas counsel was ineffective. Federal petitioners will assert that, even though a claim either was not raised or was abandoned during state habeas proceedings, the default should be excused because of state habeas counsel's ineffectiveness.

It does not require a fertile imagination to foresee the mischief that would be spawned if such a definition of "cause" were adopted. "The result [would be] akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity." *Evitts*, 469 U.S. at 411 (Rehnquist, J., dissenting). The only difference would be that, unlike mirror images which gradually shrink as they approach infinity, the importance of each successive layer of counsel's performance would *never* diminish despite the increasing distance from what should be the focus of attention – the trial and direct appeal. *See Sykes*, 433 U.S. at 90 (state trial is the "main event"); *Prihoda*, 910 F.2d at 1387 (since *Sykes*, "the trial and appeal have become the principal forum for the decision of all constitutional questions").

Resolving such allegations of ineffective habeas counsel often would require an evidentiary hearing, because just as trial and appellate counsel will not ordinarily be deemed "ineffective" without giving them an opportunity to explain their acts or omissions, the same opportunity would have to be afforded to habeas counsel. And, given the Sixth Amendment's clear inapplicability in assessing the performance of habeas counsel, *see Finley*, it is unclear what standard a reviewing court would even apply. Any attempt to identify the types of errors by

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[20] This statute provides, in pertinent part: "No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."



counsel that would constitute "cause" even though not rising to the level of constitutionally ineffective assistance would revive the confusion about the appropriate standards for judging counsel's performance that this Court's decision in *Strickland v. Washington* eliminated.[21] *See Strickland*, 466 U.S. at 683-684.

Accepting Coleman's definition of "cause" would also raise immediate questions about whether a *pro se* petitioner could similarly establish "cause" by asserting his own "ineffectiveness" or that of a prison "writ writer." *See Prihoda*, 910 F.2d at 1386 (petitioner proffered "the inadequacy of his own assistance" as "cause"). Indeed, if a *pro se* petitioner could not establish "cause" in this manner, states which provide counsel in collateral proceedings as a matter of state law would have every incentive to discontinue that practice: why should a state provide more than the Constitution requires if by doing so it opens itself up to endless litigation? *See Finley*, 481 U.S. at 559 ("Constitution does not put the State to the difficult choice between providing no counsel whatsoever [in collateral proceedings] or following the strict procedural requirements [of the Constitution]").

This Court should not cast the lower courts and the states adrift upon such uncharted waters, for, as demonstrated below, the increased burden for the judicial

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[21] Coleman's argument that, even though he had no constitutional right to counsel during his state habeas proceedings, he nevertheless is entitled to have habeas counsel's performance assessed for purposes of "cause" under *Strickland's* constitutional standard (Pet. Br. 26-27), is not only contrary to *Finley*, but also demeans the importance of the Sixth Amendment. Indeed, the fallacy of his argument manifests itself in Coleman's "best of both worlds" argument that, while entitled to show "cause" under the *Strickland* standard, *Carrier's* "exhaustion of cause" requirement does not apply to him *because* he had no constitutional right to counsel. (Pet. Br. 27-28 n.20).

system would be accompanied by ever-increasing frustration of the vital interests which *Sykes* and *Carrier* were designed to foster.[22]

**2. Establishing habeas attorney error as "cause" would subvert the interests of finality, comity and federalism.**

The federal courts' exercise of the writ of habeas corpus to review state court criminal judgments "entails significant costs." *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (footnote omitted). Those costs have been well articulated by the Court. By extending "the ordeal of trial for both society and the accused," collateral review of a criminal conviction "undermines the usual principles of finality of litigation." *Id.* at 127. *See also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 450-453 (1963). "Liberal allowance of the writ . . . degrades the prominence of the trial itself," and issuance of the writ "frequently cost[s] society the right to punish admitted offenders." *Engle*, 456 U.S. at 127. Finally, because "[f]ederal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights," the writ of habeas corpus "imposes special costs on our federal system." *Id.* at 128.

These same costs "are particularly high" when the federal writ is used to review claims that were defaulted in state court. *Id.* at 128. Indeed, such review "intrudes on

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[22] No doubt because they realized this Court would not knowingly adopt a rule that would create such burdens and difficulties for the judicial system, the inmate-respondents in *Giarratano* disavowed the idea that even a *constitutional* right to counsel during state habeas proceedings could give rise to an assertion of "cause" based upon an alleged ineffective performance by counsel. (See *Giarratano*, No. 88-411, Resp. Br. at 43; copies lodged with this Court).

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state sovereignty to a degree matched by few exercises of federal judicial authority." *Harris*, 489 U.S. at 282 (Kennedy, J., dissenting).

*Sykes* and its progeny were designed to minimize these costs and to foster and protect the interests of finality, comity and federalism. If the Court were to accept Coleman's definition of "cause," those interests would be subverted, for the states' interest in enforcing their procedural default rules in collateral proceedings is just as "vital" as their corresponding interest in enforcing such rules at trial and on direct appeal. *See Carrier*, 477 U.S. at 490.

It would be difficult to imagine an outcome that could do more harm to the interests of finality, comity and federalism than a situation where even a full round of state and federal habeas proceedings could no longer be reasonably looked upon as the "end" of a criminal case. If this Court were ever to recognize habeas counsel error as sufficient "cause" to excuse a procedural default, the Court thereby would condemn the judicial system to endless rounds of habeas litigation, each challenging the "effectiveness" of the immediately preceding counsel's performance. The costs to finality and comity – already "particularly high" – could well reach the breaking point.

Rather than subjecting themselves to such never-ending litigation, states could rationally choose to abandon their systems of collateral review. And they would be free to do so because such avenues of relief are not constitutionally required. *See Finley*, 481 U.S. at 557. Indeed, Coleman seems intent upon driving the states in that direction when he asserts that "cause" should be *less* difficult to show when a default occurs on collateral attack because "[b]y providing for collateral review, a state *concedes* that its interest in . . . finality . . . can be outweighed. . . . " (Pet. Br. 30-31 n.25, emphasis added). This Court, however, should refuse to adopt a standard of "cause" which is so open-ended that it ultimately could

result in federal habeas corpus becoming the sole avenue of collateral relief for some, or even all, state prisoners – a result detrimental to the interests of everyone involved. *See Long*, 463 U.S. at 1042 n.8 (emphasizing "vast" role state courts play in adjudicating federal constitutional claims).

## IV

## THE "NEW RULE" DOCTRINE DICTATES THAT PETITIONER CANNOT OBTAIN FEDERAL HABEAS RELIEF.

Even if this Court were to completely overlook petitioner's clear default during his state habeas corpus proceedings, there is another, equally fundamental reason why he would not be entitled to federal habeas relief: the "new rule" doctrine.

Because this is a federal collateral proceeding, this Court must determine whether Coleman seeks the benefit of a "new rule." This inquiry is mandated because "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing examination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990). A federal habeas court, therefore, must "validate reasonable, good-faith interpretations of existing precedents made by state courts." *Saffle v. Parks*, 110 S.Ct. 1257, 1260 (1990).

The "new rule" doctrine is not restricted to cases where a petitioner asks for retroactive application of a case that was decided after his conviction became final. When state courts make "reasonable, good-faith interpretations of existing precedents . . . ," subsequent rulings to the contrary by a federal habeas court are "new" and are thus prohibited. *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990), *citing United States v. Leon*, 468 U.S. 897 (1984) ("good faith" exception to exclusionary rule).



Determining whether a state court's rejection of a petitioner's claims was "reasonable" and in "good faith" requires a determination whether constitutional precedent existing at the time the petitioner's conviction became final "compelled" a decision in his favor. *Saffle*, 110 S.Ct. at 1261. Acceptance of a petitioner's claims cannot be considered to have been "compelled," however, if they were "susceptible to debate among reasonable minds." *Butler*, 110 S.Ct. at 1217.

Coleman's conviction and death sentence became final when this Court denied certiorari on March 19, 1984. *Coleman v. Virginia*, 465 U.S. 1109 (1984). None of the claims raised in his federal habeas petition was in any sense "compelled" in 1984, nor are any of his claims "compelled" even today.[23] Conversely, all of his claims were and remain "susceptible to debate" among reasonable jurists. Indeed, the best evidence of this fact is that the state habeas judge, the district court, and to some extent a unanimous panel of the court of appeals, all found that Coleman's claims were meritless. (J.A. 3-19, 39-52, 64-68). *See Butler*, 110 S.Ct. at 1217 ("that the outcome . . . was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges . . . noted previously.").

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[23] The federal claims which Coleman raised in the Fourth Circuit were as follows: a member of the jury failed to disclose a preconceived opinion of Coleman's guilt; Coleman's trial attorneys rendered ineffective assistance at both stages of trial; the prosecutor failed to disclose exculpatory evidence; the evidence was insufficient to support Coleman's conviction; the jury instructions at the penalty stage were constitutionally inadequate; Virginia's death penalty statute is unconstitutional as applied to Coleman.

Coleman merely disagrees with the good faith legal judgments reached by the state habeas judge and concurred in by the district court. His claims, therefore, are clearly requests for "new rules" and as such are barred from review unless they fall within one of two "narrow" exceptions. *Sawyer*, 110 S.Ct. at 2831. Even a cursory review of his claims demonstrates that neither exception applies. None of his claims would "place an entire category of primary conduct beyond the reach of the criminal law" or "prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Id.* Nor can it be said that acceptance of any of his claims would alter any of the "bedrock" principles which are "absolute prerequisites to fundamental fairness." *Id.* at 2831-2833. Under these circumstances, federal habeas relief cannot be granted on any of petitioner's claims.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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January, 1991

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No. 89-7662

In The

# Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

*Petitioner,*

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit**

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This reply brief is submitted on behalf of petitioner, Roger Keith Coleman, in support of his claim to federal review of federal constitutional error in the conduct of his trial. The Commonwealth and its chorus of amici fail to meet Coleman's demonstration that such review is not barred by his counsel's non-tactical late filing of a notice of appeal to the Virginia Supreme Court.[1]

The Virginia Supreme Court's dismissal of Coleman's petition for appeal fairly appears to interweave state and federal law. It contains no clear statement of an adequate and independent state ground. Neither respondent's repeated insistence that the decision rests solely on state law nor its analysis of Virginia law provides the missing clarity. Abandonment of the plain statement rule in search of an independent state law basis for decision is unwarranted and ultimately not fruitful.

Respondent's challenge to the application of the "cause" and the "deliberate bypass" rules consists of catastrophe metaphors rather than analysis. In fact, this case presents an opportunity for straightforward application of either rule with little, if any, sacrifice of finality and no threat of an infinite repetition of litigation or deluge of new petitions.

Finally, respondent's effort to extend *Teague v. Lane*, 489 U.S. 288 (1989), is misplaced not just in light of the scope of the grant of certiorari, but also in concept and

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[1] Respondent's Answering Brief is cited as "Resp. Br." The amicus briefs supporting respondent are cited as follows: Brief of Amicus Curiae Criminal Justice Legal Foundation ("CJLF Br."); Brief of Amicus Curiae Kentucky, et al. ("Kentucky Br."); Brief of Amicus Curiae Texas, et al. ("Texas Br.").

fact. The fact that several courts which in some fashion have (or may have) considered the merits of Coleman's claims have rejected them does not demonstrate that Coleman proposes new rules of constitutional law. *Teague* does not allow so glib a rejection of federal constitutional claims.

## ARGUMENT

### I.

### UNDER THE PLAIN STATEMENT RULE THE COURT SHOULD PRESUME THAT THE VIRGINIA SUPREME COURT'S DECISION RESTED ON FEDERAL LAW.

#### A. The Virginia Supreme Court's Decision Fairly Appears To Interweave State and Federal Law.

The Commonwealth asserts that the plain statement rule does not apply to Coleman's case because the Virginia Supreme Court's decision does not fairly appear to rest "primarily" on federal law. (Resp. Br. at 9-10; see also CJLF Br. at 5, 8.) This assertion misstates Coleman's argument and rewrites both *Michigan v. Long*, 463 U.S. 1032 (1983), and *Harris v. Reed*, 489 U.S. 255 (1989).

*Long* makes clear that the plain statement rule applies not only when the state court decision appears to rely "primarily" on federal law, but also when a "state court decision fairly appears . . . to be interwoven with the federal law." 463 U.S. at 1040.[2] Post-*Long* interpretations

[2] In addition, it is not clear that "primarily" does not simply mean "not secondarily or alternatively", in which case respondent's argument would likewise collapse.



of the rule confirm its applicability when federal and state law are interwoven. *E.g., Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987) (stating predicate to test as " 'when . . . a state court decision fairly appears . . . to be interwoven with the federal law' ") (quoting *Long*, 463 U.S. 1040-41); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2701 n.5 (1990) (finding jurisdiction where ambiguous state decision "was at least 'interwoven with the federal law' ") (quoting *Long*, 463 U.S. at 1040-41).

Respondent's motion to dismiss Coleman's appeal was based solely on the late filing (J.A. 22-24), but Coleman's opposition urged consideration of the merits to inform the Virginia Supreme Court's consideration of the motion. (Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss Appeal, dated December 18, 1986 at 14-15.) The Virginia Supreme Court then declined respondent's request for a decision on the timeliness issue before the merits were fully briefed and it did not render its decision until four months after it had a fully submitted case on the merits. Thus, when the order states that the court considered the parties' briefs on the merits as well as their papers addressing the timeliness of the appeal, it implies more than a mere list of pleadings on file.[3] It is simply not true that only the procedural issue was before the Virginia Supreme Court,

[3] This fact also defeats Texas' attempt to rely on cases in which "a state court decision . . . is silent on federal constitutional issues." (Texas Br. at 17.) Unlike those cases, in which there is no mention of federal law, the Virginia court's reference to federal law is no different than its reference to state law. It is no more "silent" on the federal law issues than it is on the state law issue.

and there is more than a fair basis for concluding that its decision resulted from an interweaving of state and federal law. (Pet. Br. at 9-14.)[4]

Indeed, the Commonwealth now concedes that the Virginia Supreme Court considered Coleman's federal claims. "The question is whether the Virginia Supreme Court *decided* the merits of Coleman's federal claims, *not* whether it merely read Coleman's merits brief or thought about the merits of his claims." (Resp. Br. at 10 n.4.) It also admits that the dismissal may have been based on alternative federal law grounds. (Resp. Br. at 7 n.3.) The acknowledgement of the possibility of a ruling on the merits is, of course, warranted; the proposition that one can conclude from the summary order that it was an alternative ruling is preposterous.[5]

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[4] In *Harris*, the Court observed that the " 'plain statement' rule relieves a federal court from having to determine whether in a given case, consistent with state law, the state court has chosen to forgive a procedural default." 489 U.S. at 265 n.11. Likewise, it relieves the federal court from having to determine whether the ruling on procedural default is driven by a determination of the federal merits.

[5] The Commonwealth does not even address the fact that the Virginia Supreme Court has in the past evaluated the federal merits in deciding whether to hear a late-filed appeal. (Pet. Br. at 11-12.) *See O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 152 S.E.2d 278, *cert. denied*, 389 U.S. 825 (1967). As in *O'Brien*, the Supreme Court may have dismissed Coleman's appeal as untimely because it found his claims to be without merit. (Pet. Br. at 11-12.)



**B. The Virginia Supreme Court's Decision Does Not Provide A Clear Statement Of An Adequate And Independent State Ground.**

Given that the Virginia Supreme Court's decision fairly appears to interweave state and federal law, *Harris* requires that, in the absence of a clear and express statement of reliance on state law, federal law be presumed the basis for decision. 489 U.S. at 263. Nothing in the order, including the word "dismissed," provides a preclusive statement of reliance on state law.[6]

The Commonwealth suggests that the order's ambiguity can be cured by review of the motion to dismiss and the state law cited therein. (Resp. Br. at 14-16; see also CJLF Br. at 10; Texas Br. at 18.) In fact, review of the papers submitted on the motion to dismiss does add clarity, but not the clarity the Commonwealth seeks. As noted above, in his response to the motion to dismiss, Coleman asked the court to ignore the thirty-day requirement because of the "significant constitutional issues in his appeal." Memorandum in Opposition to Respondent's Motion to Dismiss Petition For Appeal at 14-15 (citing, *inter alia*, *O'Brien*, 207 Va. 707, 152 S.E.2d 278). If the Commonwealth is going to examine the record for evidence of what the order was really based upon, it cannot ignore this evidence. Nor can the Commonwealth's reference to its motion to dismiss erase the Virginia Supreme

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[6] Respondent's reliance on *Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1974), as providing an explanation for the words used in Virginia Supreme Court orders is misplaced. That case does not purport to define the significance of and differences among "refusal", "dismissal" and "denial."

Court's reference in its order to the briefs on the merits or obscure the other circumstances indicating the court's consideration of the federal merits to inform its decision with respect to the timeliness of the appeal.

Respondent suggests that the order's lack of clarity should be excused because the Virginia Supreme Court did not have the benefit of *Harris'* suggested formulation for orders based on procedural default. (Resp. Br. at 16-17.) *Harris* itself dispatches that argument, noting that "state courts were familiar with the 'plain statement' requirement under *Long* [463 U.S. 1032 (1983)] and *Caldwell* [472 U.S. 320 (1985)]," both of which predate the dismissal of Coleman's appeal in 1987. *Harris*, 489 U.S. at 264. But more importantly, the validity of respondent's suggestion depends on the speculation that the Virginia Supreme Court decided Coleman's case on independent state grounds and thus would have used the *Harris* formulation. It is equally likely (perhaps more likely) that the Virginia Supreme Court would have stated that its procedural decision was informed by its view of the federal merits.

### C. There Is No Reason To Limit The Application of *Harris*.

Amici urge the Court to overrule *Harris* or at least to abandon the strict application of the plain statement rule to orders issued on collateral review. (CJLF Br. at 8-15; Texas Br. at 6-16.) Such a course is entirely unwarranted.

In *Harris*, the Court wisely held that because the adequate and independent state ground doctrine is the



touchstone for both direct and collateral review, the same rule should be used in both contexts. *Harris*, 489 U.S. at 265. In reaching this conclusion, the Court considered, and rejected, the proposition that the plain statement rule should not apply on collateral review because state interests different from those on direct appeal were implicated.[7] As the Court state in *Harris*, "[w]e believe . . . that applying *Long* to habeas burdens those interests only minimally, if at all. The benefits, in contrast, are substantial." *Id.* at 264.

Both CJLF and Texas argue that *Harris* should not apply to summary orders and that federal courts should be freed to analyze state law to determine the basis of an ambiguous order. *Harris* rejected this proposition, stating "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " 489 U.S. at 265 n.12. Furthermore, amici's argument assumes that there is a principled basis for distinguishing between "opinions" and "orders" when, in truth, there is none. The issue under *Harris* is, as it should be, the decision's clarity, not its form or its length.

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[7] Amici also argue that the plain statement rule should not apply on collateral review because adequate and independent state grounds are only a discretionary bar to collateral review. See Texas Br. at 7-8; CJLF Br. at 12. This position is illogical. The plain statement rule is aimed at easing the burden on federal courts in deciding when to review a state court decision and not at enlarging jurisdiction or affecting the exercise of discretion. *See Long*, 463 U.S. at 1041-42; *Harris*, 489 U.S. at 265.

Amici also contend that the federal habeas courts should be permitted to resolve ambiguities like the one presented here because, unlike the Supreme Court on direct review, the federal habeas courts regularly analyze and hence have greater expertise in local state law. (CJLF Br. at 9, 13; Texas Br. at 11-12.) This premise is dubious, but the argument is in any case beside the point because it is unrelated to the reasons for the Court's determination in *Harris* to apply the plain statement rule to habeas review. *Harris* was based upon an assessment of the federal courts' intrusion into the province of the state courts and the burden on federal courts of divining the meaning behind an ambiguous state court decision. *Harris*, 489 U.S. at 264-65. When, as here, a state court has actually been presented with the state law issue, "[r]equiring a state court to be explicit in its reliance on a procedural default" is less "intrusive" than is allowing "a federal court to second-guess a state court's determination of state law." *Id.* at 264. Indeed, the opinions in *Harris*, *Teague v. Lane*, 489 U.S. 288 (1989), and *Castille v. Peoples*, 489 U.S. 346 (1989), issued the same day, make clear that the Court understood how federal habeas courts review state law when it ruled that it is not appropriate for those courts to undertake their own analysis of state law after a state court has already had an opportunity to do so. *See Teague*, 489 U.S. at 299 ("The rule announced in *Harris v. Reed* assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding."). After a state court has considered the applicability of a state procedural bar and ruled thereon, the relevant question is what the ruling was, not what the state law is. Only where the latter is at issue should the



federal court undertake its own analysis of state law. (See Pet. Br. at 19 n.12.)

Finally, amici contend that the interests of finality, comity, and federalism are less affected when the Court reverses a state court in direct proceedings than when a state decision is vacated through habeas review.[8] The Court analyzed these arguments in *Harris*, 489 U.S. at 264, and decided that none of them required abandonment of the plain statement rule on collateral review.

The rule of *Harris* could not be more clear: if a state court relies on a state bar, it need only say so; if it does not say so, the federal court should presume that the federal claims before the state court were decided on their merits. That is precisely what is required in the present case.[9]

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[8] Amici ignore the other protections afforded these state interests during federal habeas, all of which were in existence when the Court decided *Harris*. The doctrine of procedural default is only the most obvious. For example, the exhaustion doctrine ensures that the state court is given the first opportunity to review a petitioner's claim, 28 U.S.C. § 2254(c) (1988), and any findings of fact made in that initial determination are accorded a presumption of correctness in federal habeas. 28 U.S.C. § 2254(d). In addition, the recent retroactivity decisions limit a habeas petitioner to federal law in existence at the time the conviction became final, a limitation not imposed on direct review. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989).

[9] Respondent argues that the Court should not find the order to be ambiguous because the lower courts' rulings to the

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## II.

## COUNSEL'S FAILURE TO FILE A TIMELY APPEAL SOUGHT BY THE CLIENT CONSTITUTES CAUSE.

Respondent has failed to refute Coleman's demonstration that the proper interpretation of the Court's holding in *Murray v. Carrier*, 477 U.S. 478 (1986), is that attorney conduct falling below the functional standard of attorney effectiveness set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), constitutes "cause" to excuse a

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contrary were not "clearly erroneous" and because Coleman has previously conceded the issue. (Resp. Br. at 12-13, 17-19.) Both arguments are without substance. Application of the plain statement rule is a question of law, not a finding of fact subject to the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure.

Second, Coleman's Petition for a Writ of Certiorari to the Supreme Court of Virginia made clear that he could not be sure as to the basis of the state court opinion:

> The Supreme Court of Virginia dismissed Petitioner's petition for appeal and denied his Petition for Rehearing, both without opinion. Accordingly, Petitioner *can only assume* that the court adopted the Commonwealth's position as articulated in its briefs.

See Cert. Ptn. No. 87-5448 at 3 n.1 (emphasis added); see also Coleman's Petition for Rehearing to the Virginia Supreme Court (order "apparently" based on the late filing). The Court in *Harris v. Reed* rejected such assumptions and required a clear and express statement of reliance on procedural default. Coleman has never conceded that the order dismissing his appeal stated an adequate and independent state ground.



procedural default. (Pet. Br. at 22-33.)[10] By basing its argument on the absence of a right to counsel during collateral review, respondent ignores the important distinction between (a) the *right* to effective assistance of counsel in state habeas proceedings and (b) whether defaults resulting from ineffective assistance of state habeas counsel should preclude federal habeas review. Coleman's argument concerns only the latter.

Recognizing ineffective assistance of post-conviction counsel as cause merely allows for the possibility of federal review of constitutional claims defaulted in state court. It does not create any new constitutional rights. Recognizing ineffectiveness as cause will not affect the number of petitions filed by state prisoners. Such claims will not submerge the courts. *Strickland v. Washington*, 466 U.S. 668 (1984), sets a very high standard for proof of ineffectiveness. Evidentiary hearings are necessary only in the exceptional cases where the claims cannot be

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[10] The Commonwealth concedes, as it must, that the right to effective assistance of counsel is a part of the safety net that ensures that application of the cause and prejudice rule will not lead to miscarriages of justice. (Resp. Br. at 33 n.16.) Its attempt to justify removal on collateral review of the net of effective counsel is of no avail; only if ineffective assistance is cause to excuse defaults at every level of state review can miscarriages of justice be avoided. *See Carrier*, 477 U.S. at 496. If ineffective assistance of state habeas counsel does not constitute cause, cases in which the petitioner has "substantial claim[s] that the alleged error undermined the accuracy of the guilt or sentencing determination," *Smith v. Murray*, 477 U.S. 527, 538 (1986), but cannot demonstrate actual innocence, will go unremedied.

decided on the pleadings. And cause alone is not sufficient; prejudice too must be established.

The Commonwealth asserts that finding ineffectiveness of post-conviction counsel to be cause will lead to never-ending litigation. (Resp. Br. at 42.)[11] That assertion is simply wrong. The successive petition and abuse of the writ doctrines give federal courts potent tools with which to manage repetitive and abusive petitions. *See* Rule 9(b) foll. 28 U.S.C. § 2254 (1988); *In re Shriner*, 735 F.2d 1236, 1239 (11th Cir. 1984) ("federal courts are not powerless to protect themselves from harassing and repetitive petitions"). It is wrong to assume that frivolous claims will overwhelm a system with such safeguards.

Nor will a holding that ineffective assistance of state habeas counsel constitutes cause burden the state courts. "Cause" is a creature of the federal, not the state, habeas system. A change in the federal system requires no corresponding change in state systems. States need not recognize ineffective assistance as cause or change their post-conviction review systems in any way.[12]

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[11] Respondent's use of the infinite mirror image from Justice Rehnquist's dissent in *Evitts v. Lucey*, 469 U.S. 387, 411 (1985), is misplaced. The dissent argued that the creation of a constitutional right to effective appellate counsel would allow petitioners to seek relief on claims that had nothing to do with the lawfulness of the conduct of their trials. Recognition of ineffective assistance as cause does not create a new constitutional right. Its function is solely to allow federal habeas courts to consider constitutional claims with respect to the lawfulness of a conviction, thus keeping focus on the trial as the main event, not layering abstract constitutional rights.

[12] It may be, as Kentucky argues, that states will be induced to provide a forum to litigate claims of ineffective

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The Commonwealth's argument that, apart from any burden on state courts, it is unfair to hold states responsible for defective habeas representation because such representation is not constitutionally required misapprehends the issue. "Cause" does *not* depend on whether the default can fairly be imputed to the state, but rather whether it is fair to charge a petitioner with a default for which he is in no sense responsible.[13] Thus, although there is no reason to hold states "responsible" when new evidence comes to light or when federal law changes, both previously unavailable facts and new law constitute cause. *See Murray v. Carrier*, 477 U.S. at 488. Similarly, where the default was caused by the conduct of

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assistance of habeas counsel. If they do, so much the better. Any improvement in the representation of prisoners is for the good and will lead to increased justice, efficiency and finality in the habeas system. If states *choose* to provide representation in response to a finding that ineffectiveness of state habeas counsel constitutes cause, the bonus of better representation will result without the intrusiveness of a federal rule mandating such representation. *Cf. Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring in the judgment).

[13] That is why respondent is wrong to rely on the fact that Coleman was represented "by a team of attorneys of his own choosing." (Resp. Br. at 40.) *Wainwright v. Torna*, 455 U.S. 586 (1982), is likewise inapposite. *Torna* did not turn on any distinction between retained and appointed counsel. Rather, *Torna* turned on the noncontroversial point that a constitutional claim cannot be created from the failure of a non-constitutionally required attorney to perfect a discretionary appeal. *Id.* at 587-88. Because Coleman does not assert any due process violation, the state's responsibility is simply irrelevant to the cause determination.

an attorney who acted outside the bounds of professionally acceptable behavior, it does not matter whether the state is "responsible" for the misconduct, for it is simply not fair in such circumstances to bar the petitioner from access to federal remedies.

Coleman has so far been barred from federal review of his substantial federal constitutional claims relating to his trial. No evidentiary hearing will be required to hold that Coleman's counsel's failure constitutes ineffectiveness.[14] No fine distinctions need be made as to whether the failure to raise or to appeal a single issue on habeas was ineffectiveness or inadvertence or strategy. No repetitive litigation will occur. No "sandbagging" has occurred, and none will be rewarded.[15]

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[14] Respondent is wrong that petitioner cannot show prejudice. Indeed, losing the right to appeal non-frivolous constitutional claims is by definition prejudice. While the state habeas court and the federal district court both ruled against Coleman's claims on the merits, neither did so with ease. Both took argument and issued detailed opinions in support of their conclusions. And the district court, by issuing a certificate of probable cause, found that Coleman had "made a substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The merits of petitioner's substantial constitutional claims of juror bias, ineffective assistance of counsel and *Brady* violations were not considered by the Fourth Circuit. No Court has held that Coleman was not prejudiced by his counsel's failure.

[15] Whether analyzed under "cause and prejudice", "deliberate bypass" or some other rubric, counsel's failure to follow petitioner's instructions to file a timely appeal is an "external impediment," that prevents the vindication of petitioner's claims. *Carrier*, 477 U.S. at 492. A petitioner cannot fairly be

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## III.

## THE DELIBERATE BYPASS STANDARD SHOULD CONTINUE TO APPLY TO FAILURES TO APPEAL AT ALL

The attacks leveled against the continued viability of *Fay v. Noia*, 372 U.S. 391 (1963), and its applicability to the instant case are without merit. It is submitted that the deliberate bypass rule of *Noia* has continuing utility, alongside the cause and prejudice doctrine, to determine when defaults of federal claims in the state courts will not bar federal habeas review.

Relying on *Wainwright v. Sykes*, 433 U.S. 72, 88-89 n.12 (1977), respondent asserts that the Court has limited *Noia* to its facts – surrender of the right to take a direct appeal – and that it has no application in the present circumstances of a collateral appeal. This argument overlooks the actual similarity of the defaults in *Noia* and in the present case, and is supported by neither *Sykes* nor its progeny. *Sykes* involved the "failure[] to raise individual substantive objections in the state trial," 433 U.S. at 88 n.12, while *Noia* involved the surrender by a criminal defendant "other than for reasons of tactical advantage, [of] the right to have all of his claims of trial error considered by a state appellate court." *Id.* In his opinion for the Court, Justice Rehnquist was at pains to avoid

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held responsible for such conduct. Where a petitioner does not deliberately bypass an appeal, but rather was prevented from appealing by the actions of his counsel or others, he has cause to excuse the resulting procedural default. *Cf. Jones v. Barnes*, 463 U.S. 745, 755 (1983) (Blackmun, J., concurring).

painting *Noia* out of existence with a "broad [*Sykes*] brush." *Id.* Thus, the Court rejected the "sweeping" dicta of *Noia* but expressly reserved as to its continued viability with respect to surrenders of the right to have all claims of trial error considered by a state appellate court. The Court clearly did not intend to decide in *Sykes* that *Noia* would be inapplicable to claims of the kind asserted by Coleman here.[16]

Respondent contends that because collateral review is not constitutionally mandated, use of the waiver standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), as would seem required by *Noia*, 372 U.S. at 439, is not warranted. (Resp. Br. at 21.) The premise of this argument is flawed. *Noia's* use of the *Johnson v. Zerbst* standard did not depend on there being a constitutional right to a direct appeal for there was not in 1963, and is not in 1991, such a right. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 392-93 (1985).

The default at issue here falls squarely within the purview of the deliberate bypass standard. Indeed, this case is far more like *Noia* than it is like *Sykes* or *Carrier*. The default was not deliberate and should be excused.

## IV.

## PETITIONER'S CLAIMS IMPLICATE ONLY WELL-ESTABLISHED RULES OF LAW.

Respondent's empty assertion that the new rule doctrine precludes federal habeas relief for Coleman need

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[16] *Murray v. Carrier*, 477 U.S. 478 (1986), applied the *Sykes* standard to the failure to raise *individual* objections on appeal but left untouched the *Noia* decision as to failures to appeal.



not detain the Court.[17] New rule analysis requires careful comparison of a petitioner's legal claims and their factual bases with the law in place at the time the petitioner's conviction became final. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Far from supplying such an analysis, the Commonwealth does not even identify the new rules on which petitioner purportedly relies. Rather, respondent argues that the district court's alternative holding that Coleman's constitutional claims are without merit means, *ipso facto*, that he seeks the benefit of new rules.[18] The logical conclusion of that argument is the extraordinary proposition that lower courts always correctly apply the law and that there is no need, at least on habeas, for appellate review.

Moreover, the mere listing of petitioner's habeas claims demonstrates that respondent's "new rule" argument is without merit. Coleman's major claims are that the prosecution withheld exculpatory evidence, his counsel provided inadequate representation at all stages of the trial and sentencing proceeding, and he was denied his

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[17] If the Commonwealth has a legitimate new rule argument, the proper time to raise it was in its brief in opposition to the petition for certiorari. *See* Sup. Ct. R. 15. The Commonwealth made no such argument at that time, and the new rule issue is in no way encompassed in the three questions on which the Court granted certiorari.

[18] The Commonwealth's assertion that the "best evidence" that Coleman's claims are "susceptible to debate" is that, *inter alia*, "to some extent a unanimous panel of the court of appeals . . . found that Coleman's claims were meritless," Resp. Br. at 47, is a blatant attempt to mislead the Court. The Fourth Circuit decided the merits of Coleman's capital sentencing claim only, and that claim is no longer at issue in this case.

right to an unbiased jury by the seating of a juror who stated before the trial that he wanted to sit on the jury to "help burn the SOB." Coleman's conviction became final in 1984. *Brady v. Maryland*, 373 U.S. 83 (1963), was decided more than twenty years earlier. The right to effective assistance of counsel has long been clear. *E.g., Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). The right to an unbiased jury is even more venerable. *E.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Far from seeking the benefit of new rules, Coleman seeks federal review of claims based upon well-established constitutional rights. These claims go to the integrity of the trial process by which Coleman was convicted and sentenced to death.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, Petitioner Roger Keith Coleman respectfully requests that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed and the cause be remanded to the Fourth Circuit for further proceedings.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROGER KEITH COLEMAN,

*Petitioner,*

*vs.*

CHARLES E. THOMPSON, Warden,
MECKLENBURG CORRECTIONAL CENTER OF THE
COMMONWEALTH OF VIRGINIA,

*Respondent.*

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

## BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

1. After *Harris* v. *Reed*, is it permissible for a federal court to analyze state law and the state court record to determine whether federal claims are barred by state procedural default when the state court summarily grants a motion to dismiss without mentioning federal law?

2. Should a federal court waive a procedural default resulting from post-conviction counsel's failure to file a timely appeal when the default would only bar rehearing of claims already heard and decided once?

3. Does the deliberate bypass standard of *Fay* v. *Noia* have any continuing value as precedent?

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990

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ROGER KEITH COLEMAN,

*Petitioner,*

*vs.*

CHARLES E. THOMPSON, Warden,
MECKLENBURG CORRECTIONAL CENTER OF THE
COMMONWEALTH OF VIRGINIA,

*Respondent.*

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# BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether respondent is actually guilty. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented in writing to the filing of this brief.

## SUMMARY OF FACTS AND CASE

According to the prosecution's case at trial, Roger Coleman raped and murdered Wanda McCoy, who was then 19, almost ten years ago. The jury found him guilty of rape and of willful, deliberate, and premeditated killing during the commission of the rape: capital murder under Virginia law. *Coleman* v. *Commonwealth*, 307 S. E. 2d 864, 865 (1983).

Evidence of guilt included matches of Coleman's pubic hair with hairs found on Wanda's body, Coleman's blood type with semen found in her body, and Wanda's blood type with a blood stain on Coleman's pants. *Id.*, at 867-868. The Virginia Supreme Court affirmed unanimously, *id.*, at 877, and this Court denied certiorari, *Coleman* v. *Virginia*, 465 U. S. 1109 (1989).

Coleman filed a state habeas petition in the state trial court, and it was heard by a judge other than the trial judge.[2] The state court held an evidentiary hearing. The court made factual findings indicating that (1) Coleman's evidence that a juror was biased was less credible than the state's evidence on the point, J. A. 4-5; (2) trial counsel conducted an adequate investigation, J. A. 16-17; and (3) the lack of mitigating circumstances in the penalty phase was due to Coleman's own actions, J. A. 8, 17.

Coleman's attorneys filed a notice of appeal a day late. They claim to have believed that time runs from the day the clerk records the order rather than the day the judge signs it. J. A. 29, 32.

The state filed a motion to dismiss the appeal as untimely, relying solely on state law. J. A. 22-24. While the motion was pending, the parties filed briefs on the merits. The Virginia Supreme Court issued an order reciting the filing of the various papers and concluding with this statement. "Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." J. A. 25-26.

2. The trial judge was Judge Persin, 307 S. E. 2d, at 864; the habeas judge was Judge Phillips, J. A. 15.



Coleman then filed a federal habeas petition. The district court found that the claims raised for the first time on state habeas were procedurally barred. J. A. 39. However, the court went to rule on the merits as an alternative holding. In denying a further evidentiary hearing, the federal court found that "Coleman was represented by counsel [in the state proceeding], was given a fair opportunity to present any evidence that he wanted to and the court proceeded to rule on all matters that were presented to it." J. A. 40. The court proceeded to find "on the merits that there was no denial of any constitutional rights of Coleman in his trial . . . " and denied relief. J. A. 51-52.

The Fourth Circuit affirmed, upholding the finding of procedural default. *Coleman* v. *Thompson*, 895 F. 2d 139, 144 (1990). The court noted that the Virginia rule regarding time to appeal was clear. *Id.*, at 143.

This Court granted certiorari limited to questions 2, 3, and 4 in the petition, *Coleman* v. *Thompson*, 112 L. Ed. 2d 305 (1990), which are the questions related to the procedural default issue.

## SUMMARY OF ARGUMENT

*Harris* v. *Reed*, 489 U. S. 255 (1989) did nothing more than apply *Michigan* v. *Long*, 463 U. S. 1032 (1983) to habeas corpus. The *Long* rule should be applied on habeas as it has actually been applied on direct review.

Under *Long*, a presumption that the state decision does not rest on independent state grounds arises *only* when the decision fairly appears to rest *primarily* on federal law. Only then is a plain statement to the contrary needed to rebut the presumption.

Generally speaking, summary denials without opinion do not fairly appear to rest primarily on federal law. The *Long/Harris* rule is inapplicable to such decisions. It is both necessary and proper in such cases to examine the pleadings and state law to determine if the judgment rests on independent state grounds.

*Fay* v. *Noia*, 372 U. S. 391 (1963) has no value as precedent. It was based on a distortion of history; the rule it announced was dictum; it has been completely supplanted by subsequent cases. *Noia* should be formally and completely overruled.

Notwithstanding his protests, Coleman has *not* been denied "any hearing of [his] constitutional claims." Cf. Pet. Cert. question 3. He received a full and fair hearing in the state habeas court. Ineffective assistance on habeas corpus should not be considered "cause" for the reasons stated by the Attorney General.

## ARGUMENT

### I. *Long* applies only to state decisions which fairly appear to rest primarily on federal law.

*A.* Long *as Actually Applied.*

The holding of *Harris* v. *Reed*, 489 U. S. 255 (1989) is simply that the rule of *Michigan* v. *Long*, 463 U. S. 1032 (1983) applies to habeas corpus. *Harris*, at 263. While the *Long* rule is referred to as a "plain statement" rule, see *id.*, at 261, that expression is merely shorthand for the holding of *Long* and its progeny. The phrase should not be lifted out of context and applied mechanically; the *Long* rule should be applied on habeas corpus in the same way that it has actually been applied on direct review.

The *Long* rule is a form of presumption. See *Long*, 463 U. S., at 1042, n. 8. "[W]e merely assume that there are no



such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground *and* when it fairly appears that the state court rested its decision primarily on federal law." *Id.*, at 1042 (emphasis added). This is a two-part, conjunctive test. The lack of a plain statement does not raise the presumption unless the second part is also satisfied.

*Harris* cited six post-*Long* cases, 489 U. S., at 261, n. 7, none of which is based solely on the absence of a "plain statement" from the state court opinion. In *New York* v. *Class*, 475 U. S. 106, 109 (1986), the Court first noted that state and federal cases were used by the state court, "generally citing both for the same proposition." Only after this pattern of parallel citations indicated that the decision was primarily based on federal law did the absence of the "plain statement" become significant. See *id.*, at 109-110.

The *Class* Court did not limit its discussion to the face of the opinion, contrary to what Coleman claims the *Long* rule requires. See Pet. Brief 14-15. In interpreting the state opinion, the Court referred to the state rule against discussing constitutional grounds when statutory grounds resolve the case, citing state case law for that proposition. *Class*, *supra*, 475 U. S., at 110.

In *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678, n. 3 (1986); *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 872, n. 4 (1986); *Maryland* v. *Garrison*, 480 U. S. 79, 83 (1987); and *Kentucky* v. *Stincer*, 482 U. S. 730, 735-736, n. 7 (1987), this Court specifically noted that the state court had expressly relied on federal authority in reaching its decision. Only then was the absence of a plain statement of independent state grounds dispositive.

*Michigan* v. *Chesternut*, 486 U. S. 567 (1988) demonstrates that there is no "four corners" limitation in the *Long* rule. Cf. Pet. Brief 18, n. 11. The state court had rested its decision on two state cases. See *People* v. *Chesternut*, 157 Mich. App. 181, 403 N. W. 2d 74, 75-76 (1986). That reliance might initially indicate that the decision did not rest primarily on federal law. However, the *Chesternut* Court went beyond the face of the

state court opinion to review the authorities cited and determined that those precedents were based on federal law and not independent state grounds. 486 U. S., at 571 and n. 3.

Most of the opinions of this Court applying *Long* have been cases where independent state grounds were not found. Decisions which do rest on independent state grounds would generally result in a denial of certiorari and hence no opinion. One exception is *California* v. *Freeman*, 488 U. S. 1311 (1989), an opinion by Justice O'Connor as Circuit Justice denying a stay of the California Supreme Court's decision in *People* v. *Freeman*, 46 Cal. 3d 419, 758 P.2d 1128 (1988).

*Freeman* involved the prosecution of a film producer for pandering, on the theory that paying actors to perform sexual acts was prostitution. The state court opinion was divided into two main parts. The part titled "First Amendment Considerations" had given the statute a narrow construction to avoid federal constitutional problems, but the part titled "The Statutory Language" had only discussed the words of the statute and their prior construction. 488 U. S., at 1314; see 46 Cal. 3d, at 423-425. Nowhere in the state court opinion is there a specific, self-conscious statement that the two reasons for construing the statute narrowly are independent of each other. That conclusion is inferred from the structure of the opinion. 488 U. S., at 1314.

*Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) was relied on heavily by the *Harris* Court. See 489 U. S., at 261, 263-265. The *Caldwell* Court also went behind the face of the state court opinion, examining the state procedural bar cases cited in the state court opinion to determine whether the state court had made the requisite statement. 472 U. S., at 327-328. The *Caldwell* Court also emphasized that "the Mississippi court discussed the challenge . . . at some length, evaluating it as a matter of both federal and state law before rejecting it as unmeritorious." *Id.*, at 328.

In short, *Long*'s references to a "plain statement" requirement and the "face of the opinion" come into play only *after* it is determined that the decision fairly appears to rest primarily



on federal law. Sources outside the opinion may properly be considered in making that threshold determination.

### *B. The* Harris *Decision.*

Bearing in mind the *Long* rule as it has actually been applied, we return to the decision in *Harris* v. *Reed*, 489 U. S. 255 (1989). *Harris* itself initially summarized the *Long* rule this way:

> "Under *Long, if 'it fairly appears that the state court rested its decision primarily on federal law,'* this Court may reach the federal question on review unless the state court's opinion contains a ' "plain statement" that [its] decision rests upon adequate and independent state grounds.' " *Id.*, at 261 (quoting *Long, supra*, 463 U. S., at 1042) (footnote omitted, emphasis added).

Throughout the opinion, the Court repeatedly emphasizes that it is doing nothing more than applying the *Long* rule. "Thus, we are not persuaded that we should depart from *Long* and *Caldwell* simply because this is a habeas case." *Harris*, 489 U. S., at 265. At one point, however, there is a critical slip. *Harris* unequivocally announces its intent to adopt the *Long* rule without change and in the same breath misstates the rule:

> "*Caldwell* thus indicates that the problem of ambiguous state-court references to state law, which led to the adoption of the *Long* 'plain statement' rule, is common to both direct and habeas review. Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ' "clearly and expressly" ' states that its judgment rests on a state procedural bar." *Id.*, at 263.

The capsule statement which follows the colon in this passage is ***not*** an accurate statement of the *Long* rule as it has actually been applied by this Court. It omits the critical prerequisite that the state decision first fairly appear to rest pri-

marily on federal law. The omission appears to be inadvertent, and the rule is accurately stated elsewhere in the opinion. See *id.*, at 261, quoted *supra*.

When the *Harris* Court turns to applying the *Long* rule to the case, it notes once again the importance of the state court ruling on the merits of the federal question. The state court's only mention of procedural default had been a statement that the issues could have been raised on appeal and a reference to the state procedural default rule. *Id.*, at 258, 266. *Harris* states that this passing reference might arguably have sufficed "had the state court never reached the federal claim." *Id.*, at 266, n. 13. It was because "the state court *clearly* went on to address the merits," *ibid.* (emphasis added), that the *Long* presumption came into operation. "It is precisely with regard to such an ambiguous reference to state law *in the context of clear reliance on federal law* that *Long* permits federal review of the federal issue." *Ibid.* (emphasis added).

The present case comes to this Court in precisely the opposite context. The clear reliance on federal law which produced the assumption of jurisdiction in *Long*, and in every case which has found jurisdiction under *Long*, is completely absent here.

By its very nature, a summary order denying relief without discussion or citation will never, on its face, create a fair appearance of resting primarily on federal law. That being the case, does the *Harris/Long* rule apply to summary dispositions at all?

## II. The *Harris/Long* rule generally does not apply to summary dispositions.

### *A. Classification of Claims.*

The question of whether a claim is procedurally defaulted is often intertwined with the question of whether it has been exhausted. See *Harris* v. *Reed*, 489 U. S. 255, 269 (1989) (O'Connor, J., concurring). The *Harris* presumption rule is thus one facet of the larger question of how to classify a claim.



Claims presented on federal habeas corpus can be classified into five categories depending on their procedural history in the state courts: (1) unexhausted claims; (2) procedurally barred claims; (3) claims rejected on the merits by the state courts; (4) claims fairly presented to but ignored by the state courts; and (5) claims for which there is not and never has been effective state corrective process.

Unexhausted claims may not be considered on federal habeas at all if the state objects. 28 U. S. C. § 2254(b); cf. *Granberry* v. *Greer*, 481 U. S. 129, 134-135 (1987) (discretionary if state omits objection). Even a single unexhausted claim requires dismissal of the entire petition. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). The exhaustion rule does not apply, however, in the "absence of available State corrective process or the existence of circumstances rendering such process ineffective . . . . " 28 U. S. C. § 2254(b). Hence claims in the fifth category above may be considered.

The exhaustion requirement is met if a claim is fairly presented to the state courts but ignored by them. When the state court decision does not mention the claim it is both necessary and proper to go behind the opinion and examine the pleadings to determine whether the claim was presented and on what grounds it was opposed. See *Castille* v. *Peoples*, 489 U. S. 346, 350-351 (1989); *Smith* v. *Digmon*, 434 U. S. 332, 333 (1978) (per curiam). A determination that the claim has been exhausted is a prerequisite to the application of the *Harris* rule. See *Harris* v. *Reed*, 489 U. S. 255, 263, n. 9 (1989). Where the decision in question is an unexplained summary denial, therefore, it will *always* be necessary to examine the pleadings in order to classify the claim.

When a federal question is presented to a court in a petition other than a direct appeal as of right, there are several reasons why that petition might be denied. The question might be one which should not be normally presented in an original proceeding in an appellate court, even though that court technically has jurisdiction. See, *e.g.*, Supreme Court Rule 20.4(a) (habeas corpus). Summary denial in such cir-

cumstances is not a decision on the merits.[3] The petition may be a petition for discretionary review which may be denied even if the decision below is incorrect. See *Brown* v. *Allen*, 344 U. S. 443, 491 (1953); *Castille* v. *Peoples*, *supra*, 489 U. S., at 351. Such denials express no view on the merits. *Brown*, *supra*, 344 U. S., at 492. If the denial is for either of these reasons, the claim may be unexhausted if there is another state court which will hear the claim on the merits. See *Peoples*, *supra*, 489 U. S., at 351-352.

If the petition is neither inappropriate nor discretionary, a decision on a fairly presented federal question will be based either on a procedural bar or on the merits.[4] Can it be said that a summary denial without discussion or citation fairly appears to rest primarily on federal law? That is the predicate fact which brings the *Harris/Long* presumption into force. *Harris*, *supra*, 489 U. S., at 261. The answer lies in the pleadings.

The federal habeas court presented with state court orders or opinions not mentioning the federal question must first examine the pleadings to determine exhaustion under *Smith* v. *Digmon*, *supra*. If in these pleadings the state has opposed the claim solely on the merits, then it may be said that the state court decision fairly appears to rest on federal law. While the state court might search out a procedural default on its own and rule on that basis without briefing or argument, such action is unlikely. When a party makes only one argument, "the most reasonable explanation," *Long*, *supra*, 463 U. S., at 1041, for an unexplained ruling in that party's favor is acceptance of that argument. By the same reasoning, the grant of a motion to dismiss based solely on procedural bar is most reasonably explained as resting on the procedural bar.

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3. This point is discussed at length in our brief in *Ylst* v. *Nunnemaker*, No. 90-68.

4. An opinion ignoring the federal question is effectively the same as denial on the merits. See *Smith* v. *Digmon*, *supra*.



*B. Arguably Barred Claims.*

Most advocates, of course, will defend their judgments on both substantive and procedural grounds when both are available. When substantial arguments on both the merits and an adequate and independent state procedural bar have been presented, a summary denial does not indicate a preference for either. The decision in such a case does not fairly appear to rest *primarily* on federal law. The predicate for the *Harris/Long* presumption is missing.

What should a federal habeas court do when the *Harris* rule does not apply? The answer lies not in *Harris*, but in the two other habeas cases decided the same day. In *Teague* v. *Lane*, 489 U. S. 288 (1989),[5] petitioner raised a claim under *Swain* v. *Alabama*, 380 U. S. 202 (1965) for the first time on federal habeas corpus. *Teague*, at 297. Under Illinois law, failure to raise a claim at trial or on appeal forfeits the claim, subject to a "fundamental fairness" exception. *Ibid*. The *Teague* Court resolved the issue by examining Illinois law and deciding for itself that the exception would not apply. *Id*., at 297-298. "The rule announced in *Harris* v. *Reed* . . . is simply inapplicable in a case such as this one, where the claim was never presented to the state courts." *Id*., at 299.

*Castille* v. *Peoples*, 489 U. S. 346 (1989) goes a step further. In that case the federal question had been presented to a state court, but only in a petition for discretionary review. *Id*., at 347. This petition alone was insufficient for exhaustion, *id*., at 351, but further inquiry was warranted.

> "The requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law. See, *e.g.*, *Engle* v. *Isaac*, 456 U. S. 107, 125-126, n. 28 (1982);

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5. Part III of *Teague* is a majority opinion. See *id*., at 316 (White, J., concurring in part).

*Teague* v. *Lane*, *ante*, at 297-298. We leave that question for the Court of Appeals." *Id.*, at 351-352.

Thus the *Teague* approach to procedural bar, *i.e.*, deciding the issue without the use of *Harris*-type presumption, is not limited to cases where the claim was *never* presented to the state courts. It also applies to a case where the claim was summarily denied on a discretionary petition, probably for reasons other than the merits.

The present case does not fall squarely within the ambit of either *Harris* on the one hand or *Teague* and *Peoples* on the other. The rationale of one or the other must be extended to cover this situation. Amicus submits that the *Long* rule has already been stretched to the limit in *Harris* and that the present case should be governed by *Teague*.

In part II-C of the opinion, the *Harris* Court discusses and dismisses the asserted reasons why the *Long* rule should not apply to habeas corpus. However, there are some important differences between direct review and habeas corpus which are not mentioned in this section. First, when this Court reverses on a federal question on direct appeal and remands, the case merely goes back to the state courts with the federal error corrected. The state courts can and frequently do reassert state grounds at that point and reinstate the earlier result. See, *e.g.*, *People* v. *P. J. Video, Inc.*, 68 N. Y. 2d 296, 501 N. E. 2d 556 (1986) on remand from *New York* v. *P. J. Video*, 475 U. S. 868 (1986); *Van Arsdall* v. *State*, 524 A. 2d 3 (Del. 1987) on remand from *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986). The interference with state courts is far greater on habeas corpus. The state court gets no second chance to clarify the basis for its ruling.

Second, the limitation on this Court's jurisdiction avoided by the *Long* rule is absolute. If ambiguity precludes jurisdiction, a grave injustice committed by a court which erroneously believes itself to be bound by federal precedent, see, *e.g.*, *People* v. *Chesternut*, 157 Mich. App. 181, 403 N. W. 2d 74, 76 (1986), reversed *Michigan* v. *Chesternut*, 486 U. S. 567 (1988), may go uncorrected. The procedural default bar to habeas



review, in contrast, has the substantial exception of cause and prejudice, which will redress most cases of unjust results, backed up by the " 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris*, *supra*, 489 U. S., at 271 (O'Connor, J., concurring). This built-in exception makes the *Long* rule less necessary on habeas than it is on direct review.[6]

Third, *Long* was concerned with this Court's limited ability to interpret the laws of all fifty states. 463 U. S., at 1039. Federal district courts do not have that problem. See *Harris*, *supra*, 489 U. S., at 283 (Kennedy, J., dissenting). Furthermore, the lower federal courts must necessarily be familiar with state procedural default law in order to apply the exhaustion doctrine, see *Peoples*, *supra*, 489 U. S., at 351, and to determine procedural default of claims never presented to a state court. *Harris*, at 269-270 (O'Connor, J., concurring).

Finally, there was a consideration in favor of review present in *Long* and present to a lesser degree in *Harris*, but which is not present at all in this case. The *Long* Court was concerned that ambiguous state court opinions addressing federal questions would create a body of federal case law which was insulated from this Court's review. 463 U. S., at 1040 and 1042-1043, n. 8. The need for uniformity could be met only by a decision by this Court.

This consideration has less weight on habeas corpus, even where there is a full, published state opinion. A lower federal court decision does not create uniformity because it is not *stare*

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6. Justice Stevens' diametrically opposed view appears to be based on a belief that reversal of convictions is never an injustice, but merely a state "overprotecting" its citizens. See *Harris*, *supra*, 489 U. S., at 267 (concurrence); *Van Arsdall*, *supra*, 475 U. S., at 695-697 (dissent). It is unlikely that the child victims in *Kentucky* v. *Stincer*, 482 U. S. 730 (1987) felt "overprotected" by their state court. See also *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934) (justice due also to the accuser).

*decisis* in state courts.[7] Nonetheless, federal habeas review may prompt states to reconsider and overrule erroneous decisions.

This problem is completely absent, however, in the case of summary denials which may be based on procedural default. Summary orders such as the one in the present case will generally not be reported at all, see generally R. Stern, *Appellate Practice in the United States* 480-482 (2nd ed. 1989) (criteria for publication), and even where they are they will have little or no weight as precedent. In California, for example, simple denials are printed only in the court minutes in the advance sheets and are not preserved in the permanent official reports.

The main impetus behind *Harris* seems to be a desire to simplify habeas corpus litigation. Habeas corpus is indeed complex, and simplicity is indeed a virtue, but simplicity does not override all other values. The ultimate simplicity would be to return to the rule of *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830) that conviction by a court of unquestioned jurisdiction cannot be collaterally attacked, period. No one is suggesting that.

Whether simplicity justifies a presumption in summary denial cases is an open question. The *Harris* Court did comment on summary dispositions in footnote 12. However, this comment was merely in response to a statement in the dissent. The issue was not actually presented in the case before the Court. Footnote 12 is dictum, not a holding of the case.

It is one thing to presume the absence of independent state grounds "in the context of *clear* reliance on federal law." *Harris*, *supra*, 489 U. S., at 266, n. 13 (emphasis added). It is quite

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7. In *State* v. *Vickers*, 768 P. 2d 1177, 1188, n. 2 (Ariz. 1989), for example, the Arizona Supreme Court refused to accept the Ninth Circuit's decision in *Adamson* v. *Ricketts*, 865 F. 2d 1011 (1988) that jury sentencing was constitutionally required in capital cases. The state court was right; the federal court was wrong. *Walton* v. *Arizona*, 110 S. Ct. 3047, 3054-3055, 111 L. Ed. 2d 511, 524-525 (1990).



another to insist that state courts begin inserting explanations into previously unexplained summary denials, particularly those of the state's highest court. For the reasons discussed more fully in the Brief Amicus Curiae of the Criminal Justice Legal Foundation in *Ylst* v. *Nunnemaker*, No. 90-68, the intrusion into the inner workings of state supreme courts would be substantial.

The correct rule, amicus submits, is this. The *Harris/Long* presumption, by definition, applies only "in the context of clear reliance [by the state court] on federal law." A summary denial constitutes such clear reliance *only* when the petition is opposed by the state solely on the merits. If a motion is made to dismiss solely on the basis of a state procedural rule and if there is no exception to the rule intertwined with federal law, cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), a grant of the motion conclusively establishes a procedural default. In all other cases, there is no presumption either for or against independent state grounds, and the federal habeas court should address the procedural default in the same manner which this Court addressed it in *Teague*.[8]

## III. *Fay* v. *Noia* has no value as precedent.

Coleman asks this Court to breathe new life into *Fay* v. *Noia*, 372 U. S. 391 (1963). He cites *Presnell* v. *Kemp*, 835 F. 2d 1567, 1577 (CA11, 1988) for the proposition that *Noia* is not "a dead letter." Pet. Brief 40, n. 32. Amicus submits that just the opposite is true. *Noia* has been dead for years; it is high time it was buried.

There are three reasons for not following *Noia* as precedent: the decision itself, the erosion of its precedential value by later cases, and the failure of its rule to adequately respect the state's interest in finality.

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8. This statement of the rule assumes no earlier state opinions on the issue. That question is addressed in *Nunnemaker*.

*A. The* Noia *Decision.*

After the summary of the facts, the *Noia* opinion launches into what may be the most extensive distortion of history in the annals of jurisprudence. *Noia*'s departures from reality cannot be cataloged in the short space allotted for an amicus brief. Fortunately, they do not need to be, for they are fully and devastatingly described in more learned sources. First, there is the characteristically scholarly dissent by Justice Harlan. *Noia*, 372 U. S., at 449-463. *Noia*'s version of the history of the common law writ is fully refuted in Oaks, *Legal History in the High Court — Habeas Corpus*, 64 Mich. L. Rev. 451 (1966). The true story of the legislative history is given in Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965). Justice Powell branded the *Noia* version of history "revisionist" in *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 252 (1973) (concurrence) although he generously attributed his differences to "recent scholarship." *Id.*, at 253.

This rewrite of history was apparently thought to be necessary to justify the next step: ignoring a landmark precedent squarely on point. In *Brown* v. *Allen*, 344 U. S. 443 (1953), this Court considered three cases together. Procedural default was an issue in the case of the third petitioner, Daniels.

Daniels' case was similar to the present case. His counsel filed the appeal a day late, and it was stricken as untimely. *Brown* equated failure to appeal with failure to object. *Id.*, at 486. Significantly, the *Brown* Court noted that the state procedural default rule did not itself violate the Constitution. *Ibid.* The Court concludes Daniels' case with this paragraph:

> "Finally, federal courts *may not* grant habeas corpus for those convicted by the state except pursuant to § 2254. See note 17, *supra*. See also note 2, *supra*. We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief; p. 447, *supra*, but *clearly the state's procedure for relief must be employed* in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. *A failure to use a state's available remedy*, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, *bars federal habeas corpus*. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to *empower* the Federal District Court to issue the writ. The judgment *must* be affirmed." *Id.*, at 486-487 (emphasis added).



Words do not get much clearer than these. Although the procedural default rule has exceptions, where the rule applies it is mandatory and jurisdictional, not discretionary and based on comity. Yet after mentioning Daniels' case briefly, *Noia* says "The point is that the Court, by relying upon a rule of discretion, avowedly flexible, . . . , has refused to concede jurisdictional significance to the abortive state court proceeding." *Noia*, *supra*, 372 U. S., at 426. That statement is quite simply false.

It is one thing to carefully consider a past decision, decide it was ill-advised, and honestly overrule it. It is quite another to simply pretend that a precedent does not say something which it unquestionably does say.

> "[The] doctrine [of stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' " *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986).

Given the importance of the doctrine, is a case entitled to any more respect *as* stare decisis than the case itself paid *to*

stare decisis? Amicus submits that it is not. If responsible judges are duty bound to abide by irresponsible precedents, our law will very quickly degenerate.

Third, and finally, *Noia* commits the cardinal sin of Article III adjudication: it announces a rule which it does not apply to the case before it. See *Wainwright* v. *Sykes*, 433 U. S. 72, 95-96, n. 3 (1977) (Stevens, J., concurring). Noia had counsel, knew he had the right to appeal, and specifically decided not to. *Noia*, 372 U. S., at 397, n. 3. A bypass more deliberate can scarcely be imagined.

The Court decided that Noia's clearly deliberate bypass would not be deemed deliberate because he had a good reason: fear of a death sentence on retrial. *Id.*, at 440. This result is better explained by the *Sykes* test than it is by the *Noia* test. The Court believed Noia had good *cause*, and the fate of the co-defendants leaves no doubt as to prejudice. See *id.*, at 395-396.

The failure of *Noia* to apply its own test provides the best reason for not accepting the deliberate bypass test as precedent. It is pure obiter dicta. See *Sykes*, *supra*, 433 U. S., at 87. As such, it has never been precedent. *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

*B. Subsequent Developments.*

*Noia* made two substantial changes in the law. It replaced the absolute bar of defaulted claims with the "deliberate bypass" test, and it rejected both exhaustion and independent state grounds as bases for the procedural default rule. Neither of these holdings is the law today.

*Davis* v. *United States*, 411 U. S. 233 (1973) introduced "cause and prejudice" into the procedural default lexicon. *Davis* held that Fed. Rule Crim. Proc. 12(b) was an express waiver provision enacted by Congress with a specific standard for exceptions. That standard could not properly be defeated by permitting collateral review upon a lesser standard. *Id.*, at 242.



*Francis* v. *Henderson*, 425 U. S. 546 (1976) extended *Davis* to similar claims by state prisoners. Considerations of federal/state comity require at least as much respect for state waiver rules as for federal rules in similar circumstances. *Id.*, at 541-542. As noted above, *Wainwright* v. *Sykes* specifically rejected the *Noia* rule as dictum. *Reed* v. *Ross*, 468 U. S. 1, 10-11 (1984) confirmed that *Sykes* applied to appellate defaults. *Murray* v. *Carrier*, 477 U. S. 478, 490-492 (1986) eliminated any lingering doubt on that point.

Coleman still asserts *Noia* as authority for the deliberate bypass test when there has been no appeal at all. Pet. Brief 39-40. For the reasons discussed in part C, below, this is a distinction without a difference.

*Noia*'s rejection of exhaustion as the basis for the procedural default rule, 372 U. S., at 434-435, still stands. *Brown* v. *Allen*, *supra*, is effectively overruled on this point. *Noia*'s adoption of the *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) waiver standard, however, is rejected by *Sykes*, *supra*, 433 U. S., at 87-88. *Sykes* itself did not explicitly fill in the doctrinal gap, however. It referred at different points to comity and federalism, *id.*, at 84, 88, and to independent state grounds. *Id.*, at 81.

*Harris* v. *Reed*, 489 U. S. 255 (1989) has now clarified the doctrinal vagueness of *Sykes*.

> "The confusion among the courts evidently stems from a failure to recognize that the procedural default rule of *Wainwright* v. *Sykes* has its historical and theoretical basis in the 'adequate and independent state ground' doctrine. 433 U. S., at 78-79, 81-82, 87. Once the lineage of the rule is clarified, the cure for the confusion becomes apparent." *Id.*, at 260 (footnote omitted).

The last vestige of *Noia* was supplanted in *Harris*. The independent state ground doctrine is now firmly established as the theoretical basis of the procedural default rule. Yet the magic word "overruled" has never been attached to *Noia*. The decision is something like the Cheshire Cat. See L. Carroll,

*Alice's Adventures in Wonderland* ch. 6 (1865). It is still cited as precedent even after everything of substance has disappeared. See Pet. Brief 40 and cases there cited.

*C. The State's Interest in Finality.*

The "deliberate bypass" test of *Fay* v. *Noia* is, in reality, an abolition of all state procedural requirements for the assertion of federal rights. So long as the defendant does not personally and intentionally waive the right in the sense of *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), he can assert it at any time he pleases. The only "sanction" which the state can invoke for disregard of its rules is to throw Br'er Rabbit into the briar patch by sending him directly to federal court.

The post-*Noia* cases have all had more respect for the integrity of the state courts. Cases involving trial or pre-trial defaults have emphasized the need for on-the-spot correction by the trial court. See *Davis* v. *United States*, 411 U. S. 233, 241 (1973); *Wainwright* v. *Sykes*, 433 U. S. 72, 88-89 (1977). The appellate default cases have recognized the need to resolve all issues at the earliest possible time. See *Reed* v. *Ross*, 468 U. S. 1, 10 (1984); *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986).

The common thread running through all these cases is a balancing of the interests. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of constitutional rights of state prisoners . . . . ¶ On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . ." *Reed* v. *Ross*, *supra*, 468 U. S., at 10.

Petitioner attempts to distinguish the entire cause and prejudice line of cases by looking microscopically at *Sykes* and *Carrier* and noting that the very specific finality interests mentioned in each one are not present in this case. Pet. Brief 42-44. *Reed* v. *Ross*, however, recognized the state's interest in broader terms. The integrity of the state's rules and proceedings and the finality of its judgments would be severely impaired by a rule which effectively sweeps aside the state's deadlines for appeals.



*Browder* v. *Director, Ill. Dept. of Corr.*, 434 U. S. 257 (1978) recognizes the importance of time deadlines on appeals. *Browder* noted that Fed. Rule App. Proc. 4(a) applies to habeas corpus, *id.*, at 265, n. 9, and held that the civil rules in question also applied. *Id.*, at 271. The Court had this to say about the importance of time limits:

> "The purpose of the rule is clear: It is 'to set *a definite point of time when litigation shall be at an end*, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.' " *Id.*, at 264 (quoting *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943) (emphasis added)).

For this reason, the time limit was held to be "mandatory and jurisdictional." *Ibid.* When the losing party in a federal habeas corpus case defaults under Rule 4(a) and 28 U. S. C. § 2107, the Court of Appeals lacks the *power* to review the judgment. Strict time limits are "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.*, at 271.[9]

If the federal courts will strictly enforce time limits in federal habeas proceedings, why should the state's time limits be entitled to any less respect? Cf. *Francis* v. *Henderson*, 425 U. S. 536, 541-542 (1976). The state's interests in finality are just as important as in the other cause and prejudice cases, and they call for the same compromise result. Neither the absolute, jurisdictional bar of *Brown* v. *Allen* nor the virtually unlimited review of *Fay* v. *Noia* is called for here. The cause and prejudice test remains the appropriate balance.

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9. The would-be appellant in *Browder* was the state, but nothing in the opinion or in the statutes or rules on which it is based suggests that the result would be different if the roles were reversed.

*D. Conclusion.*

As we stated at the beginning of this section, *Fay* v. *Noia* has been dead for years. It is time to give it a burial, respectful or not. Cf. *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963) (Harlan, J., concurring). *Noia* should be explicitly overruled.

## CONCLUSION

The reasons why ineffective assistance on collateral review should not be considered "cause" are well stated in the brief of the Attorney General, and amicus will not burden the Court with repetitive argument here. We will make one additional point, however. Coleman's claim that he has been denied *any* review of his claims, Pet. Cert. question 3, is simply incorrect.

Coleman's claims in this matter have been reviewed either by the state supreme court on direct appeal or by the state habeas court. What he seeks now is not initial review but repeated review.

Yet despite the fact that Coleman was convicted of a terrible crime in a proceeding which has been reviewed and found free of reversible error, the contention will surely be made that Coleman will be executed "because" of his lawyers' mistake. Cf. *Butler* v. *McKellar*, 110 S. Ct. 1212, 1225-1226, 108 L. Ed. 2d 347, 366 (1990) (Brennan, J., dissenting). Such accusations are nonsense. If this Court affirms, Coleman will be executed *because* he raped and murdered Wanda Faye McCoy.

The decision of the Court of Appeal for the Fourth Circuit should be affirmed.

Dated: January, 1991

Respectfully submitted,

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*Attorney for Amicus Curiae*

(10)



NO. 89-7662

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROGER KEITH COLEMAN, Petitioner

- versus -

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA Respondent

On Writ Of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

# BRIEF OF AMICI CURIAE FOR RESPONDENT THOMPSON BY KENTUCKY AND ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, WASHINGTON, WEST VIRGINIA

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## *QUESTIONS PRESENTED FOR REVIEW

1. Under Harris v. Reed, (1989) 489 U.S. 255, is it permissible for the federal court to analyze, on federal habeas review, state law and state court record to determine whether federal claims are barred by state procedural default?

2. Should federal court waive procedural default resulting from post-conviction counsel's failure to file timely appeal when default would bar any hearing on petitioner's constitutional claims?

3. Does the deliberate bypass standard of Fay v. Noia, 372 U.S. 391 (1963), continue to apply to procedural default resulting from complete failure to take appeal?

*This brief will only address questions 2 and 3.

## COUNTERSTATEMENT OF QUESTIONS 2 and 3 PRESENTED FOR REVIEW

DOES ATTORNEY ERROR IN STATE PROCEEDINGS WHERE THE SIXTH AMENDMENT'S RIGHT TO COUNSEL DOES NOT APPLY CONSTITUTE "CAUSE" TO EXCUSE A PROCEDURAL DEFAULT?

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## INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENT THOMPSON

The Amici Curiae represented here are States interested in the application of the rule of procedural default regarding state court post-conviction proceedings as a bar upon claims made by petitioners in federal habeas corpus proceedings.

Amici submit this brief in support of Respondent, Charles E. Thompson, Warden, Mecklenburg Correctional Center, Commonwealth of Virginia, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 37.3.

## SUMMARY OF ARGUMENT

In Wainwright v. Sykes, 433 U.S. 72 at 88-90 (1977), this Court recognized a basic principle of finality for criminal convictions and imposed a requirement of "cause and prejudice" to excuse a procedural default in state court regarding constitutional errors asserted in a federal court habeas petition. The Sykes requirement is applicable to state

post-conviction proceedings and appeals. The Sixth Amendment's right of effective assistance of counsel is not applicable to post-conviction proceedings and appeals. A violation of the Sixth Amendment's right to effective assistance is "cause" for procedural default, but when the Sixth Amendment does not apply, no right to counsel exists and counsel's errors may constitutionally be imputed to the habeas petitioner since no constitutional right has been violated. If a habeas petitioner may assert an error of counsel in a state post-conviction proceeding or appeal as "cause" for procedural default, the Sykes principle of finality will be destroyed since a habeas petitioner may undertake endless successive litigation merely by alleging ineffective assistance of counsel in the previous post-conviction proceeding or appeal. The state courts would, as a practical matter, be forced to permit successive post-conviction petitions, and the federal courts would be required to permit

successive habeas petitions, in order to resolve successive claims of ineffective assistance of counsel regarding the previous post-conviction proceeding or appeal. Sykes and subsequent opinions of this Court applying Sykes have effectively adopted Justice Harlan's dissenting opinion in Fay v. Noia, 372 U.S. 391 at 448-476 (1963). The Sykes principle of finality requires that the "deliberate bypass" standard of Fay v. Noia, 372 U.S. at 438-439 be overruled and that "cause" for a procedural default in a post-conviction proceeding or appeal be limited to external impediment or actual innocence.

## ARGUMENT

IN PROCEEDINGS WHERE THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT APPLY (STATE POST-CONVICTION PROCEEDINGS), ATTORNEY ERROR MAY NOT CONSTITUTE "CAUSE" FOR STATE PROCEDURAL DEFAULT.

Coleman was convicted of rape and capital murder in the Virginia State courts. The Supreme Court of Virginia affirmed his

conviction on direct appeal. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied 465 U.S. 1109 (1984). Next Coleman filed a petition for post-conviction relief (application for a writ of habeas corpus under Virginia law) in the appropriate state court. The Buchanan County Circuit Court held an evidentiary hearing and denied the writ. Coleman's post-conviction counsel filed a petition for leave to appeal to the Virginia Supreme Court, but because his notice of appeal had been filed more than thirty (30) days after entry of final judgment in violation of Virginia Supreme Court Rule 5:9(a), the Virginia Supreme Court dismissed the appeal. Coleman v. Thompson, 895 F.2d 139 at 141-142 (4th Cir. 1990). The Federal District Court and the Fourth Circuit concluded that the failure of Coleman's post-conviction counsel to timely and properly perfect his application for appeal to the Virginia Supreme Court constituted a procedural default barring review of his

claims under the federal habeas corpus statute. 895 F.2d at 144. In concluding that Coleman failed to demonstrate "cause" for his procedural default, the Fourth Circuit stated in part, 895 F.2d at 144:

> The difference in the proceedings [between a direct appeal from a judgment of conviction and a discretionary appeal from a denial of post-conviction relief] is significant, for a state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel. Murray v. Giarratano, __ U.S. __, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). Wainwright v. Torna [455 U.S. 586 (1982)] rejects a claim that is essentially similar to Coleman's. In Torna, a prisoner's counsel filed an application for discretionary review in the State Supreme Court one day late. The prisoner charged that this error denied him effective assistance of counsel. The Supreme Court held: "Since [the prisoner] had no constitutional right to counsel, he cannot be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." 455 U.S. at 587-88. Because Coleman, like Torna, had no constitutional right to counsel, he cannot be deprived of the effective assistance of counsel. Thus, he cannot show "cause" by showing ineffective assistance of counsel.

In Wainwright v. Sykes, 433 U.S. 72 at 88-90 (1977), this Court recognized a basic

principle of finality for criminal convictions and imposed a requirement of "cause and prejudice" to excuse a procedural default in state court regarding constitutional errors asserted in a federal habeas petition. Sykes limited the "deliberate bypass" standard of Fay v. Noia, 372 U.S. 391 at 438-439 (1963). The Sykes rule and finality principle were reiterated by this Court in Engle v. Issac, 456 U.S. 107 at 126-129 (1982). See especially Id., 456 U.S. at 126-128 and n.31 [citing, inter alia, Sanders v. United States, 373 U.S. 1 at 24-25 (1963) (Harlan, J., dissenting)]. The Sykes standard and finality principle were subsequently applied to state appellate court proceedings. Murray v. Carrier, 477 U.S. 478 at 494-495 (1986); Smith v. Murray, 477 U.S. 527 at 533 (1986).

In Pennsylvania v. Finley, 481 U.S. 551 (1987), the Court held that the states are not required by the federal constitution to provide assistance of counsel in collateral (post-conviction) proceedings and that if a

state elects to do so such counsel need not comply with all the requirements imposed pursuant to the Sixth Amendment. The court stated in part, 481 U.S. at 555:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to do so today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of appellate process. [Citations omitted.]

The court further stated in Finley, 481 U.S. at 558 and 559:

> [T]he substantive holding of Evitts [v. Lucey, 469 U.S. 387 (1985)] -- that the State may not cut off a right to appeal because of a lawyer's ineffectiveness -- depends on a constitutional right to appointed a counsel that does not exist in state habeas proceedings. . . . At bottom, the decision below rests on premise that we are unwilling to accept -- that when a State chooses to offer help to those seeking relief from

convictions, the Federal Constitution dictates the exact form that such assistance must assume. . . . In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated [pursuant to the Sixth Amendment.]

In Evitts v. Lucey, 469 U.S. 387, 396, n.7, the court noted in part:

> Of course, the right to effective assistance of counsel is dependent on the right to counsel itself. See Wainright v. Torna [supra.] ("Since respondent had no constitutional right to counsel, he cannot be deprived of effective assistance of counsel by his retained counsel's failure to file the application timely") (footnote omitted).

In United States v. Frady, 456 U.S. 152 at 164-165 (1982), the ninth collateral attack upon a D.C. conviction pursuant to Title 28 U.S.C. Section 2255, the Court found that the D.C. Circuit had erroneously applied the "plain error" standard for direct appeals to a collateral attack and stated:

> Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when as here, he already has had a fair opportunity to present his claims to a federal forum. Our trial

> and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post conviction collateral attacks. To the contrary, a final judgment commands respect. For this reason, we have long and consistently held that a collateral challenge may not do service for an appeal. [Emphasis added.]

In Barefoot v. Estelle, 463 U.S. 880 at 887 (1983), the Court stated in pertinent part:

> [I]t must be remembered that direct appeal is a primary avenue for review of a conviction of a sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas corpus proceedings, while important in assuring the constitutional rights are observed, is secondary and limited. Federal Courts are not forums in which to relitigate state trials.

Also see Strickland v. Washington, 466 U.S. 668 at 697 (1984), "[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment."

In Thomas v. Arn, 474 U.S. 140 (1985), this Court affirmed the judgment of the Sixth Circuit which had held that Thomas had forfeited her right to appeal from the judgment of the district court denying the habeas corpus writ by failing to file objections to the federal magistrate's report as required by a rule of the Sixth Circuit. It should be noted that in that case Thomas was represented by counsel and the error in failing to object to the Magistrate's Report was that of counsel representing Thomas in the habeas corpus proceeding. The final argument made by Thomas was that the decision of the Sixth Circuit denied her statutory right of appeal in violation of the Due Process Clause. On this point, the court stated in part:

> We recently reiterated our long-standing maxim that "the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." The same rationale applies to the forfeiture of an appeal, and we believe that the Sixth Circuit's rule is reasonable. Litigants subject

> to the Sixth Circuit's rule are afforded "ar. opportunity . . . . granted at a meaningful time and in a meaningful manner," to obtain a hearing by the Court of Appeals. [Citations and secondary quotation marks omitted.]

If an attorney error, as in the Thomas case, could forfeit a federal habeas corpus petitioner's right of appellate review, then clearly a failure by counsel in a state post-conviction proceeding to comply with state law may operate as a procedural default for purposes of federal habeas corpus review. If the error of counsel, as in the Thomas case, may be imputed to the federal habeas corpus petitioner on appeal in federal court, then the error of counsel in a state post-conviction proceeding appeal may also be imputed to the federal habeas corpus petitioner. As this Court's opinion in Barefoot v. Estelle, and United States v. Frady, supra, suggest post-conviction proceedings, be they state or federal, are secondary to the primary means of review, direct appeal from conviction (to the extent authorized by law).

In Murray v. Carrier, 477 U.S. 478 (1986), the Court held that defense counsel's inadvertence in failing to raise a due process claim on direct appeal from conviction in state court did not establish cause for procedural default in order to permit a federal court to review the claim under the habeas corpus statute. In that case, the court stated in part, 477 U.S. at 488:

> So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort's to comply with the State's procedural rule. . . . Similarly, if a procedural default is a result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for default be imputed to the State[.] [Emphasis added.]

In Strickland v. Washington, 466 U.S. 668 at 687 (1984), the court established the standard for ineffective assistance of counsel and described it in pertinent part:

> [T]he defendant [habeas petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. [Emphasis added.]

The Court further stated in Murray v. Carrier, 477 U.S. at 491 and 492:

> We likewise believe that the standard for cause should not vary depending on the timing of a procedural default on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. . . . It is apparent that frustration of the State's interests that occurs when an appellate procedural rule was broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than a deliberate decision, tactical or not, to abstain from failing to raise the claim.
>
> * * * *
>
> The real thrust of respondent's arguments appears to be on appeal that it is inappropriate to hold the defendants to the errors of their attorneys. Were we to accept that proposition, defaults on appeal would presumably be governed by rule equivalent to Fay v. Noia's "deliberate by-pass" standard [372 U.S. 391 at 438-439 (1963)], under which only personal waiver by the defendant will require enforcement of a procedural default. We express no opinion as to whether counsel's decision not to take an appeal at all might require treatment under such a standard[.]

Petitioner's assertion to the effect that convicts must be guaranteed effective assistance of post-conviction counsel in order to pursue a claim of ineffective assistance of trial counsel should be rejected because such a guarantee would ultimately permit unlimited litigation of ineffective assistance of counsel claims merely by alleging counsel in a previous post-conviction proceeding or appeal therefrom (including federal habeas proceedings) was ineffective. It cannot be doubted that such claims are increasingly being asserted by convicts attacking their convictions. See for example: Vunetich v. Commonwealth, 1990 Kentucky Lexis 96 (September 27, 1990) (petitions for rehearing and modification pending), [Vunetich in his second post-conviction proceeding claimed "that his last appellate counsel was ineffective in raising the question of the ineffectiveness of his previous appellate counsel who he claims was ineffective in

raising the issue of ineffectiveness of his trial counsel."]; Lingar v. State, 766 S.W.2d 640 (Mo., 1989), cert. denied 110 S.Ct. 258, [in a second post-conviction proceeding Lingar claimed ineffectiveness of counsel in previous post-conviction proceeding]; Resnover v. State, 547 N.E.2d 814 at 816 (Ind. 1989) (death penalty case), citing Schiro v. State, 533 N.E.2d 1201 at 1204-1205 (Ind. 1989) (death penalty case), cert. denied 110 S.Ct. 268; Lane v. State, 521 N.E.2d 947 at 948 (Ind. 1988) cert. denied 110 S.Ct. 268, and Alston v. State, 521 N.E.2d 1331 at 1335 (Ind.App. 1988); People v. Churchill, 136 Ill.App.3d 123, 482 N.E.2d 355 (1985), cert. denied 476 U.S. 1118; Commonwealth v. Lawson, 549 A.2d 107 (Pa. 1988); Datta v. Maass, 91 Or.App., 222, 754 P.2d 36 (1988), review denied, 306 Or. 413, 761 P.2d 531, [in a second post-conviction proceeding petitioner claimed he had ineffective assistance of counsel in previous post-conviction

proceeding]; Blair v. Armontrout, 916 F.2d 1310 at 1331-1332 (8th Cir. 1990), [Blair argued pro se his constitutional right to effective assistance of counsel was infringed when his court appointed counsel failed to raise all exhausted issues in the federal district court habeas proceeding and on appeal therefrom]; Andre v. Guste, 850 F .2d 259 at 263 (5th Cir. 1988), [habeas petitioner filed successive petition; "[i]f we were to hold that, despite Andre's failure to timely appeal the dismissal of his first petition, Andre could obtain an out-of-time appeal by the simple expedient of refiling his first petition, that would be tantamount to doing away with the clear requirements of [Fed.R.App.P] Rule 4 for an entire class of litigation."].

As the Illinois Court of Appeals noted in People v. Churchill, 482 N.E.2d at 357:

> The only differences between the three [post-conviction] petitions appear to be that each petition merely adds new attorneys to the list of those alleged to be incompetent. This strategy of

> continually filing new petitions for post-conviction relief based on incompetency of counsel could go on ad infinitum.

As the Indiana Court of Appeals declared in Alston v. State, 521 N.E.2d at 1335:

> We decline to take a step backward and create a new vehicle by which a defendant could use a PCR [post-conviction relief petition] to attack a previous PCR on the grounds of incompetency of counsel in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity.

In Commonwealth v. Lawson, 549 A.2d at 112, the Pennsylvania Supreme Court concluded:

> [W]e cannot permit our continuing concern for assuring that persons charged with crime receive competent representation in their defense to be exploited as a ploy to destroy the finality of judgments fairly reached . . . . We hold today that the mere assertion of ineffective assistance of counsel is not sufficient to override the waiver and "finally litigated" provisions in the P.C.H.A. [Post-Conviction Hearing Act], as to permit the filing of repetitive or serial petitions under the banner of that statute. [Footnote omitted.]

In United States ex rel. Spurlark v. Wolff, 699 F.2d 354 (7th Cir. 1983) (en banc), the Seventh Circuit held the claim presented

by the habeas petitioner was defaulted for failure to raise it on appeal in the Illinois courts (anticipating correctly the decision in Carrier). After reviewing the opinions of this Court and cases from the Second, Third, Fourth, and former Fifth Circuits, the Seventh Circuit concluded:

> After analyzing the factors discussed [previously] . . . and the language of the recent Supreme Court decisions we agree that the rumors of Fay [v. Noia, 372 U.S. 391 (1963)]'s death are not greatly exaggerated.

In Presnell v. Kemp, 835 F.2d 1567 at 1580 (11th Cir. 1988), cert. denied 488 U.S. 1050, the Eleventh Circuit upheld a state law prohibiting successive post-conviction petitions. After reviewing the precedents of this Court and the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits, that Court concluded that the failure to raise a claim in the first state post-conviction petition was a procedural default requiring that the habeas petitioner show cause and prejudice. The Eleventh Circuit explained its reasoning in part (835 F.2d at 1579):

The cause and prejudice test is more compatible with the scheme of section 2254 than is the deliberate bypass test. In fact, giving a state prisoner an evidentiary hearing in federal court on a claim the state collateral attack court has refused to hear because it was in a successive petition, unless the state proves that the prisoner deliberately bypassed his state remedy, would frustrate that scheme. First, as we have pointed out, the state could rarely demonstrate a deliberate bypass; consequently, the federal courts almost always would be forced to hold evidentiary hearings on defaulted claims. Moreover, because the deliberate bypass test would seldom operate to bar a claim, collateral attack counsel might be more likely to overlook a claim in preparing his client's first state petition, thus increasing the number of claims to be resolved in the first instance by the federal courts.

Second, the application of the deliberate bypass test could lead to forum shopping. Because the deliberate bypass test focuses on the actual knowledge of the petitioner, rather than the constructive knowledge of his attorney, counsel could ensure that the test would present no bar to a claim simply by not explaining the claim to his client. The state could not meet the deliberate bypass standard if the petitioner was ignorant of his claim at the time of the default.

In Buelow v. Dickey, 847 F.2d 420 (7th Cir. 1988), cert.denied 489 U.S. 1039, the Wisconsin Supreme Court dismissed the Buelows'

petition for discretionary review of the Wisconsin Court of Appeals' Opinion affirming their convictions. The Wisconsin Supreme Court found that the petition was untimely filed. Wisconsin argued that procedural default barred federal habeas review of the Buelows' claims except under Sykes "cause and prejudice" standard. The Seventh Circuit agreed that Sykes should be applied rather than the "deliberate bypass" standard of Fay v. Noia. Likewise, in Morrison v. Duckworth, 898 F.2d 1298 at 1300-1301 (7th Cir. 1990), the Seventh Circuit concluded that because there is no constitutional right to counsel for a post-conviction proceeding, the petitioner could not assert ineffective assistance of counsel as cause for a procedural default in failing to assert habeas claims in state post-conviction proceedings.

In Toles v. Jones, 888 F.2d 95 at 99-100 (11th Cir. 1989), en banc rehearing granted, 905 F.2d 346 (1990), the Eleventh Circuit employed analysis similar to that of the

Fourth Circuit in this case, citing Carrier, Torna, and Finley:

> As cause for the procedural default of the ineffective assistance of trial counsel claim, Toles cites the inadequate assistance rendered by court-appointed coram nobis counsel. Toles alleges that counsel should have amended the pro se petition once it became clear that an ineffective assistance claim existed. Constitutionally ineffective assistance of counsel is cause for a procedural default. This argument presupposes that Toles has a constitutional right to counsel in a coram nobis proceeding. Since Toles had no constitutional right to coram nobis counsel, he cannot excuse a procedural default based upon ineffective assistance rendered by that counsel. [Citations omitted.]

Amici respectfully submit that this Court's opinions in Wainwright v. Sykes, Engle v. Issac, and Murray v. Carrier, supra, effectively indicate that the court has implicitly adopted the reasoning of the opinion of Justice Harlan (joined by Justices Clark and Stewart) dissenting in Fay v. Noia, 372 U.S. 391 at 448-476 (1963), and that the "deliberate bypass standard" (372 U.S. at 438-439) should be overruled. See especially

Engle v. Issac, 456 U.S. at 128, citing Justice Harlan's dissent in Sanders v. United States, 373 U.S. 1 at 24-25 (1963). The essence of Justice Harlan's opinion is that if a claim of error could not be considered by this Court on petition for certiorari, the claim should not be reviewed by the federal district court under the habeas corpus statute. (372 U.S. at 468-469). As Justice Harlan noted (372 U.S. at 473-474), quoting Yakus v. United States, 321 U.S. 414 at 444 (1944):

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Justice Harlan further noted in part (372 U.S. at 476), quoting Larson v. United States, 275 F.2d 673 at 679-680 (5th Cir. 1960):

> Manifest justice to an accused person requires only that he have an opportunity to correct errors that may have led to an unfair trial. The orderly administration of justice

requires that even a criminal case some day come to an end. [Emphasis added]

Dissenting in Sanders v. United States, 373 U.S. at 24-25, Justice Harlan stated in part:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community . . . . And while the scope of collateral review has expanded to cover questions of the kind raised by petitioner here, the Court has consistently held that neither habeas corpus [now Title 28 U.S.C. §2254] nor its present federal counterpart §2255 is a substitute for an appeal.

The amici states respectfully submit that this Court's opinion in Carrier is fully applicable to this case, and that Carrier permits the error of Coleman's counsel on post-conviction appeal be attributed to Coleman as a procedural default. It is further submitted that the error of counsel here, as in Carrier, cannot constitute cause for the default.

As the Court recognized in Murray v. Carrier, 477 U.S. at 489, a claim of ineffective assistance of counsel asserted as cause for a procedural default is simply an indirect means of presenting a claim of ineffective assistance of counsel. A rule that a federal habeas corpus petitioner may assert ineffective assistance of counsel regarding a state post-conviction proceeding or appeal therefrom as cause for a procedural default in the federal habeas corpus proceeding would simply become an indirect means of requiring that the states guarantee effective assistance of counsel regarding post-conviction proceedings and appeals. The states would be indirectly required to permit a convict to file a second post-conviction petition to require a second post-conviction hearing in order to ascertain the effectiveness of post-conviction counsel, or litigate the effectiveness of post-conviction counsel in the federal habeas court. Furthermore, the requirement of effective

assistance of post-conviction counsel would extend infinitely to an unlimited number of post-conviction proceedings since the convict could allege that his immediately previous post-conviction proceeding counsel was ineffective in failing to assert or adequately prove or adequately argue on appeal a claim regarding a constitutional error that the convict alleges occurred during his trial or on direct appeal from his conviction.

Neither the United States Constitution nor Congress in enacting 28 U.S.C. §2254 intended to require that every state criminal conviction became an endless series of post-conviction proceedings. See Delo v. Stokes, 110 S.Ct. 1880 (1990). As the Court has recognized in Sykes, Issac, Carrier, Smith and Barefoot, at some point the process must come to a conclusion. The standard for "cause" regarding a state post-conviction proceeding must be limited to "external impediment" and "actual innocence" as defined

in Murray v. Carrier, 477 U.S. at 492 and 495-496. Ctherwise, no criminal conviction will ever come to a conclusion.

## CONCLUSION

WHEREFORE, the opinion below should be affirmed.

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(11)



No. 89-7662

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1990

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ROGER KEITH COLEMAN,

*Petitioner,*

v.

CHARLES E. THOMPSON, WARDEN,
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

*Respondent.*

---

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

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# BRIEF AMICUS CURIAE OF THE STATES OF TEXAS, ALASKA, CALIFORNIA, MISSISSIPPI, OKLAHOMA, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

I. When the Virginia Supreme Court expressly granted the Commonwealth's motion to dismiss Petitioner's state habeas corpus appeal, and the motion was based solely on petitioner's untimely notice of appeal, does *Harris v. Reed*, 489 U.S. 255 (1989), present any obstacle to enforcement of the procedural default doctrine?

II. Does the "deliberate bypass" test have any application in the context of a procedural default which occurred during a state collateral appeal?

III. Can a petitioner successfully assert attorney error as "cause" for a default which occurred during state habeas proceedings where he had no constitutional right to counsel but was represented by three retained attorneys of his own choosing?

(This brief addresses only the first question presented for review.)

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No. 89-7662

**IN THE**
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**ROGER KEITH COLEMAN,**
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**On Petition for Writ of Certiorari**
**To the United States Court of Appeals**
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# BRIEF AMICUS CURIAE OF THE STATES OF TEXAS, ALASKA, CALIFORNIA, MISSISSIPPI, OKLAHOMA, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF RESPONDENT

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the States of Texas, Alaska, California, Mississippi, Oklahoma, South Dakota, and Wyoming, by and through the Attorney General of Texas, and file this Brief Amicus Curiae in Support of Respondent, Charles E. Thompson, Warden, Mecklenburg Correctional Center of the Commonwealth of Virginia.[1]

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[1]For clarity, Petitioner will be referred to as "Coleman."

## INTEREST OF AMICI

*Amici* are States with an interest in continued federal respect for the procedural bars imposed by state courts and in the considerations of federalism, comity, and finality from which the federal habeas doctrine of procedural default derives.

This brief is submitted by *amici* through their respective Attorneys General or Chief State Attorneys in accordance with Rule 37.5 of the Rules of the Supreme Court.

## STATEMENT OF THE CASE

Following a four day trial, on March 18, 1982, a Virginia jury convicted Coleman of the rape and capital murder of his sister-in-law. A separate capital sentencing hearing ensued, and the jury recommended a sentence of death upon findings of Coleman's future dangerousness and the "outrageously or wantonly vile" nature of his crime. In accordance with the jury's verdict, the trial court assessed punishment at death. On September 9, 1983, the Virginia Supreme Court affirmed Coleman's conviction and sentence. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). Coleman's direct appeal concluded on March 19, 1984, when this Court denied his petition for writ of certiorari. *Coleman v. Virginia*, 465 U.S. 1109 (1984).

On April 26, 1984, thirty-six days after the denial of certiorari review, Coleman through his counsel of choice filed a petition for state habeas corpus relief in the trial court. After conducting a two day evidentiary hearing and upon making detailed findings of fact and conclusions of law, the trial court on September 4, 1986, denied habeas relief (JA 3-19).[2] Coleman's counsel filed notice of appeal

[2]"JA" refers to the Joint Appendix in this case, with citation to applicable page numbers.



on October 7, 1986, outside the thirty-day time period prescribed by Virginia law. Thereafter, he unsuccessfully sought from the trial court a "correction" of the date of judgment. In the Virginia Supreme Court, the Commonwealth moved for dismissal of the appeal solely on the basis of Coleman's untimely filing of notice of appeal. On May 19, 1987, that court expressly granted the Commonwealth's motion to dismiss.[3]

On April 22, 1988, Coleman initiated a federal habeas action in the United States District Court for the Western District of Virginia. The district court on December 6, 1988, denied habeas corpus relief, concluding that Coleman's appellate default on state habeas foreclosed federal review of certain claims and, alternatively, addressing the claims as if that procedural bar did not exist. *Coleman v. Thompson*, Civil Action No. 88-0125-A, mem. op. (W.D. Va. Dec. 6, 1988) (JA 35-52). On January 31, 1990, the United States Court of Appeals for the Fourth Circuit affirmed, primarily on the basis of Coleman's procedural default during state habeas proceedings. Significantly, the court below held that the order of dismissal was not ambiguous within the meaning of *Harris v. Reed*, 489 U.S. 255 (1989), because the state law basis of decision was clear. *Coleman v. Thompson* 895 F.2d 139, 143 (4th Cir. 1990) (JA 53, 57-58).

## SUMMARY OF ARGUMENT

The Court should restrict the applicability of the plain statement rule on federal habeas review to those cases in which there is "an ambiguous [state court] reference to state law in the context of clear reliance on federal law." *Harris v. Reed*, 489 U.S. 255, 266 n.13 (1989).

[3]Since then, Coleman repeatedly has acknowledged that his appeal was dismissed as untimely.

The condition precedent to application of the plain statement rule of *Michigan v. Long*, 463 U.S. 1032 (1983), is a state court's disposition of a federal issue. On direct review, the plain statement rule serves federal and state interests. It limits this Court's forays into the unfamiliar territory of state law and prevents the mere possibility of an independent and adequate state ground from interfering with this Court's performance of its role as ultimate expositor of federal constitutional law. The state's interest in finality is served where an erroneous decision of federal law is corrected close to the time of trial, and concerns of comity are accommodated because the state court has an opportunity, on remand, to rectify this Court's erroneous assumption of the absence of a state law ground of decision. These federal interests are only slightly, if at all, implicated on habeas review, while the concerns of comity and finality are accommodated to a significantly lesser degree.

Moreover, the plain statement rule can be applied easily and rationally on federal habeas review only in atypical cases. In cases where the last state court entering a judgment does not provide reasons for its disposition, or where the petitioner raises multiple claims for relief or presents repetitive petitions, the plain statement rule is likely to nullify the clear intent of state courts to impose procedural bars. Particularly in the more typical cases, there is a need for the lower federal courts, which are familiar with local law and must inevitably apply it, to be able to consider state law and the state court record to determine whether the plain statement rule is applicable.

Finally, on direct review, the plain statement rule assumes the prior presentation of claims to state courts in a procedurally correct manner. Where federal claims have been presented to state courts in a procedurally inappropriate manner, federal habeas courts should not presume that the state courts nonetheless passed upon the claims. At the very least, the lower federal courts should be authorized to follow this Court's example and consider



state law and the state court record in making the determination whether the condition precedent to application of the plain statement rule--a fair appearance of reliance on federal law--exists.

## ARGUMENT

Coleman's failure to file timely a notice of appeal from the state trial court's denial of habeas relief precluded the Virginia Supreme Court from reviewing his claims. That court granted the Commonwealth's motion to dismiss Coleman's appeal, a motion based exclusively on Coleman's failure to file a notice of appeal within the mandatory and jurisdictional time limits prescribed by statute. The courts below correctly held that Coleman's forfeiture of his claims in state proceedings likewise foreclosed federal habeas corpus review and rejected Coleman's attempt to transform the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), into a tool for injecting ambiguity into a state court decision that clearly was founded upon state procedural grounds.

### I.

### *LONG*'S SPECIFIC FORMULATION OF THE PLAIN STATEMENT RULE CANNOT BE APPLIED SENSIBLY AND RATIONALLY IN MOST CASES ON FEDERAL HABEAS REVIEW.

In *Harris v. Reed*, 489 U.S. 255 (1989), the Court extended the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), to federal habeas actions brought under 28 U.S.C. § 2254. The *Long* Court held that where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," the mere existence of a possible adequate and independent state ground of decision will not foreclose direct Supreme Court review; rather, the state court must include a plain

statement of reliance on state law as a ground of decision separate from the federal issue. *Long*, 463 U.S. at 1040-41. As *Long* makes clear, a condition precedent to application of the "plain statement" rule is that federal law at least "fairly appear" to be the basis for the state court decision under review. In extending *Long* to habeas actions, this Court recognized, "[i]t is precisely with regard to . . . an ambiguous reference to state law in the context of clear reliance on federal law that *Long* permits federal habeas review of the federal issue." *Harris v. Reed*, 489 U.S. at 266 n.13.

The "plain statement" rule arose in the unique context of certiorari review of a state conviction via direct appeal in state court, and sound practical and prudential considerations justify its application in that context. However, in the equally unique context of habeas corpus review, the federal interests underlying *Long* are much less weighty. Moreover, the "plain statement" rule is particularly ill suited to the realities of post-conviction practice, and to apply it in the manner proposed by Coleman would unduly undermine concerns of federalism, comity, and finality. Accordingly, this Court should expressly tailor the "plain statement" rule of *Long* to fit habeas actions.

### A. Policy Concerns

In *Long*, the Court articulated several justifications for the plain statement rule. First, the plain statement rule allows the Court to avoid advisory opinions without impeding the expeditious and orderly administration of review procedures. Unlike the process of asking the state court to clarify the basis of its decision, the plain statement rule does not delay federal review or burden state courts with reconsideration of previously adjudicated cases. Second, because this Court generally is not familiar with local law and procedures, the plain statement rule decreases the burdens on the Court of consideration of state law issues. Third, when applied on direct review, the plain statement



rule preserves the independence of state courts and state law by reducing the chance that this Court will needlessly pass upon state law questions. *Long*, 463 U.S. at 1039-40.

Further, application of the plain statement rule by this Court on certiorari review serves the important federal interest of facilitating review by way of direct appeal. The Court has long recognized that direct appeal is the preferred method for review of state criminal convictions.

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review.

*Mackey v. United States*, 401 U.S. 667, 682 (1971) (separate opinion of Harlan, J.) (emphasis in original).

> [D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari--comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas corpus proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

*Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

The Court's recent decisions in the area of retroactivity attach even greater significance to direct appeal, because new rules of constitutional law generally will not be applied on collateral review. *Teague v. Lane*, 489 U.S.

288 (1989). Following *Teague*, most new rules of federal constitutional law and applications of established principles that were not dictated by existing precedent will be announced on direct review. *Butler v. McKellar*, ___ U.S. ___, ___, 110 S. Ct. 1212, 1217-18 (1990). The development of federal constitutional law, thus, increasingly depends on this Court's ability to review the opinions of state appellate courts on direct review, and where prudential considerations make an issue ripe for review by this Court, there is additional incentive for this Court to grant review in the procedural context of direct appeal. If, in *Long*, this Court had reaffirmed its prior practice of denying review on direct appeal based on the mere possibility of an independent and adequate state ground, the Court's function of announcing new principles of constitutional law would have been hampered.[4]

Moreover, this Court has an interest in granting review to address incorrect or aberrant applications of federal constitutional principles. As the *Long* Court recognized, "an important need for uniformity in federal law . . goes unsatisfied when we fail to review an opinion that rests primarily on federal law and where the independence of an alleged state ground is not apparent from the four corners of the opinion." *Long*, 463 U.S. at 1040 (emphasis omitted). Thus, following *Teague*, the plain statement rule plays an important role in facilitating the Court's role as ultimate expositor of constitutional law.

Similarly, state interests are accommodated by application of the plain statement rule to cases on direct review. Concerns of finality, although relevant even on

[4]An independent and adequate state ground stands as an absolute bar to direct Supreme Court review of state court decisions. *Long*, 463 U.S. at 1041-42. This bar is unlike the habeas doctrine of procedural default, which authorizes federal habeas review upon a petitioner's showing of cause and prejudice or a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 493-96 (1986).



direct review, *Boyde v. California*, ___ U.S. ___, ___, 110 S. Ct. 1190, 1198 (1990), are not as strong as in federal habeas review. Direct appeal is the review process that is closest in time to the "main event" of trial. If a state court's misapplication of constitutional principles results in the erroneous affirmance of a criminal conviction, the state's ability to retry the defendant is less likely to be jeopardized. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 128-29 (1982). Thus, the defendant's remedy for an incorrect state court decision is more likely to be a retrial that comports with constitutional requirements than an effective acquittal.

In addition, comity considerations are not undermined when the plain statement rule is applied on direct review. The direct appeal process typically produces written opinions, in which appellate courts set forth the bases for decision, and the *Long* Court did not purport to dictate to the state courts the manner in which they must conduct direct review. Rather, within the existing framework of direct appeals, the Court merely apprised state appellate courts of the manner in which they could demonstrate the presence or absence of Supreme Court jurisdiction. Where, as in *Long*, the state court addresses the merits of a federal issue and also refers to state law, requiring it also to include a "plain statement" of reliance on state law imposes relatively few burdens.

Further, if on direct review this Court erroneously assumes that the absence of a plain statement indicates that there was not a state law basis for the state court's decision and decides the federal question, the state court may, on remand, correct this misimpression by plainly relying on state law, thus insulating its judgment from further federal review.[5] Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Feder-*

[5]This mechanism for preserving a ruling that is adquately and independently based on state law is unavailable to the state courts if the state conviction is reversed in federal habeas review.

*alism Along a Mobius Strip*, 19 GA. L. REV. 799, 822 (1985). Indeed, one study found that, when the Court has assumed the absence of an independent and adequate state ground, the state courts on remand resolved sixty percent of the cases on the basis of state law. *Id.* at 819, *citing* Welsh, *Whose Federalism?--The Burger Court's Treatment of State Civil Liberties Judgements*, 10 HASTINGS CONST. L.Q. 819, 838 (1983); *see also Ponte v. Real*, 471 U.S. 491, 503 n.4 (1985) (Stevens, J., concurring in part) ("In a series of recent cases, this Court has reversed a state decision grounded on a provision in the Federal Bill of Rights only to have the state court reinstate its judgment, on remand, under a comparable guarantee contained in the State Constitution.") and cases cited therein.

Application of the plain statement rule to cases on direct review, thus, furthers state and federal interests. In contrast, the policies underlying *Long* are only marginally, if at all, implicated on habeas review. Moreover, the weighty considerations of comity and finality on habeas review are eviscerated by literal application of a plain statement rule that is tailored for direct review of state judgments. Federal respect for state procedural bars is now exacted at the price of federal interference in the state judicial systems. Moreover, state compliance with the plain statement rule on collateral review is so burdensome as to threaten the orderly administration of justice in the state courts.

The policy against advisory opinions is not implicated by federal habeas review, because a federal court's erroneous determination that it has jurisdiction over a federal issue and a subsequent reversal of a state conviction on that basis cannot be corrected by the state court's reliance, on remand, on an independent and adequate state ground. Further, the interest of facilitating Supreme Court review of constitutional issues on direct appeal clearly does not apply to federal habeas review. Accordingly, the Court in *Harris v. Reed* justified the extension of



the plain statement rule by assuming that federal habeas review would be expedited if federal courts were not "required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Harris*, 489 U.S. at 265. Application of *Long's* plain statement rule, however, does not significantly reduce the inquiries into state law that federal habeas courts must make and, concomitantly, does not expedite federal habeas review. Rather, inquiries into state law are inevitable on federal habeas review, and the lower federal courts are well equipped to answer them.

Federal habeas courts not only are authorized, but required, to ascertain the potential applicability of state procedural bars in assessing the availability of state remedies. The federal habeas statute provides that the requirement of exhaustion of state remedies is excused where "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b). This Court has made clear that one circumstance rendering available state process "ineffective" is a state procedural bar to review of the petitioner's claim. *Teague v. Lane*, 489 U.S. at 297-98; *Harris v. Reed*, 489 U.S. at 268-70 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., concurring). Moreover, where the exhaustion requirement is excused, the federal courts are expected to apply state procedural rules and bar federal habeas review, unless the petitioner overcomes his default by showing cause for his default and actual prejudice resulting therefrom. *Teague v. Lane*, 489 U.S. at 298-99.

Further, in determining whether a state procedural default forecloses federal habeas review, a federal court must decide whether the state ground of decision is adequate and independent, a determination that frequently entails a thorough examination of state law. In determining the adequacy of the state procedural ground, a federal court is called upon to decide whether the procedural bar is

routinely and regularly applied by the state courts and, thus, must necessarily consider an entire body of state law. *E.g., Dugger v. Adams*, 489 U.S. 401, 410-11 n.6 (1989). Moreover, a challenge to the adequacy of the state procedural grounds may, in some instances, require the federal court to consider the state procedural rule's origins and potential applications and whether the rule rationally furthers legitimate state interests. *James v. Kentucky*, 466 U.S. 341, 344-49 (1984). Further, even the existence of a state procedural bar that is facially independent of federal law does not obviate further inquiry into its "independence." Federal courts must ascertain whether the basis of the procedural rule and state crafted exceptions to application of that rule are state, rather than federal, in nature. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). At best, therefore, the plain statement rule merely shifts the focus of the federal court's examination of state procedural default rules.

Finally, the lower federal courts have a familiarity with state law that this Court cannot be expected to acquire. Accordingly, this Court defers to the lower federal courts on matters of local law. *E.g., Selvage v. Collins*, ___ U.S. ___, ___, 110 S. Ct. 974, 974 (1990) (remanding to allow Fifth Circuit initially to determine whether Texas courts would continue to apply procedural defaults following *Penry v. Lynaugh*, ___ U.S. ___, 109 S. Ct. 2934 (1989)); *Rummell v. Estelle*, 445 U.S. 263, 267 n.7 (1980) (deferring to Fifth Circuit's determination that Texas law did not bar review of petitioner's claim). The federal district courts and courts of appeals are treated as experts in such matters, and the Court both recognizes their familiarity with local law and expects it.

### B. Pragmatic considerations

The state collateral proceedings in *Harris v. Reed* possessed an attribute of direct appeal that is crucial to the rational and sensible application of *Long's* plain statement



rule: a written opinion. 489 U.S. at 258. In addition, *Harris* did not involve two circumstances that are common in state and federal collateral proceedings, the presentation of multiple grounds for relief and the repetitive litigation of claims. *Id.* In the handful of cases, like *Harris*, where these factors are combined, the plain statement rule appears a suitable solution to the problem of state decisions that are ambiguous as to actual reliance on state law grounds. However, to view such a course of state proceedings as typical is unrealistic.

The *Long* formulation both of the plain statement rule and of the condition precedent for its application embodies a presumption that the state judgment under review will be accompanied by an opinion that sets forth the bases of decision. Indeed, *Long* is replete with references to the state court's opinion. For example, the Court stated:

> It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to decide issues of state law that go beyond the *opinion that we review*, or to require state courts to reconsider cases to clarify the grounds of their decisions.

*Long*, 463 U.S. at 1040 (emphasis added). Where the state court opinion itself creates ambiguity by addressing federal issues and referring to state law without relying on it, that ambiguity is best and most logically resolved in that opinion. Absent an opinion, the plain statement rule is not susceptible to direct application.

If federal respect for state procedural defaults requires the existence of an opinion, that respect is exacted at too great a price, because an appellate opinion represents the investment of considerable societal resources. It is important that criminal convictions be, and appear to be, the product of fair proceedings. The direct appeal process

itself ensures fairness, and the appellate opinion satisfies society's interest in the appearance of fairness. These interests justify the expenditure of significant resources to provide indigent defendants pursuing direct appeals of right with transcripts, *see Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956), and counsel, *Douglas v. California*, 372 U.S. 353, 35€ (1963). Similarly, these interests warrant the extensive use of judicial resources that is required to produce an appellate opinion, in which a majority of the tribunal typically agrees not only on the ultimate result but on the reasons for that result. Formal briefing by the parties and often oral argument, the preparation of draft opinions, and conferences among the appellate judges precede the issuance of an opinion.

Once these societal interests are satisfied, a presumption of legality attaches to the final conviction. *Barefoot v. Estelle*, 463 U.S. at 887. It is not reasonable either to expect or require that the states expend equivalent resources on collateral review or in cases where the criminal defendant has not properly invoked the jurisdiction of the state court. Blind application of *Long's* plain statement rule in the latter categories of cases is to require no less. *E.g., Nunnemaker v. Ylst*, 904 F.2d 473, 476 (9th Cir. 1990) (California Supreme Court's denial without comment of an original state petition for writ of habeas corpus vitiates the California Court of Appeal's plain statement, on direct appeai, of reliance on a procedural bar), *cert. granted*, ___ U.S. ___, 110 S. Ct. 340 (1990).

Further, state prisoners typically present multiple grounds for relief in petitions for state collateral relief. The federal habeas doctrines of exhaustion and abuse of the writ encourage this practice. Rule 9(b) of the federal habeas rules prevents the piecemeal litigation of claims on federal habeas corpus by foreclosing federal review of claims that could and should have been adjudicated in a prior federal action. Moreover, before presenting all available claims, the state prisoner must have afforded the state



courts a fair opportunity to pass upon the merits of each claim. 28 U.S.C. § 2254(b), (c); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Where the state also has procedural rules designed to discourage the piecemeal presentation of federal claims on collateral review, state habeas petitions are particularly likely to include more than one ground for relief.

If multiple grounds for relief are presented on state collateral review, the appellate court that is the last state court to enter a judgment cannot easily write "in a one-line *pro forma* order . . . that 'relief is denied for reasons of procedural default.'"[6] For example, the Sixth Circuit in *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990), held that an appellate court's statement that "other assertions of error are either without merit or not preserved for appellate review" is ambiguous and does not preclude federal review. Although the state appellate court's reference to the preservation of error under state law occurred on direct appeal, the Sixth Circuit's reasoning could be extended to a state appellate court's *pro forma* statement on collateral review that the issues presented are without merit or procedurally barred. The purpose for issuing a summary order would thereby be defeated, because state appellate courts would be required to address expressly each specific claim presented on collateral review, stating whether it was procedurally barred.

Finally, although the *Harris* Court only purported to extend *applicability* of the plain statement rule of *Long* to habeas review, 489 U.S. at 265, its literal language expands the *scope* of that rule to the derogation of concerns of federalism and comity. The requirement that "the *last* state court rendering a judgment in the case 'clearly and expressly' state[ ] that its judgment rests on a state procedural bar," 489 U.S. at 263 (emphasis added), is tenable

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[6] *Harris v. Reed*, 489 U.S. at 265 n.12.

only in the procedurally unilinear and finite context of a direct appeal. Further, the judgment of the "last" state court is significant only if one assumes that the court has passed upon claims that it previously had not adjudicated. Such an assumption ignores the undeniable fact that state prisoners file repetitious petitions for relief. Indeed, this reality of post-conviction litigation is reflected in the federal habeas rule governing successive petitions and abuse of the writ, Rule 9(b), 28 U.S.C. foll. § 2254.[7]

Following *Harris*, where a state court on direct appeal plainly states that its rejection of a federal constitutional claim rests on the state law ground of procedural default, a state prisoner has every incentive to reurge the claim on state collateral review in hopes that the "last" reviewing court will not reiterate the procedural bar. *Harris*, thus, will burden the state courts with an increased volume of collateral attacks on final judgments while increasing, through the requirement of a plain statement from the last state court, the amount of judicial resources that must be expended to preserve federal respect for state procedural bars. The appellate court that is the last state court to render a judgment in the collateral proceeding is, for the reasons discussed above, unlikely to do more than summarily affirm the denial of state habeas relief; it is particularly unlikely to do so when it has already stated that review and relief are unavailable because of a procedural default. Accordingly, if language in *Harris* must be literally applied, it "undermines the finality of state review procedures and encourages the petitioner's repetitious raising of frivolous points in hopes that some last court, somewhere, will not incant the magic phrase of procedural bar." *McCoy v. Lynaugh*, 874 F.2d 954, 959 (5th Cir.), *stay denied*, ___ U.S. ___, 109 S. Ct. 2114 (1989).

[7]The Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner in the pending case of *Ylst v. Nunnemaker*, No. 90-68, provides statistics regarding the workload of the California Supreme Court. *Id.* at 8-9. The situation in California exemplies the problems existing in virtually every state.



## II.

## THE CONDITION PRECEDENT TO APPLICATION OF THE PLAIN STATEMENT RULE DOES NOT EXIST IN CASES WHERE THE VERY PRESENTATION OF FEDERAL CLAIMS TO THE STATE COURTS WAS NOT PROCEDURALLY CORRECT.

The plain statement rule announced in *Long* presupposes that the party seeking federal review previously has presented his claims to the state courts in a procedurally correct manner. On direct review,

> [w]hen "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'"

*Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), *quoting Fuller v . Oregon*, 417 U.S. 40, 50 n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582 (1969). Likewise, a party who fails to invoke properly the jurisdiction of a state's highest court is foreclosed from invoking this Court's certiorari jurisdiction. *Newman v. Gates*, 204 U.S. 89, 95 (1907). In such cases, thus, the condition precedent for application of the plain statement rule--state court reliance on federal law--simply is presumed not to exist.

As the Court plainly indicates in *Rotary Int'l* and the cases cited therein, application of the plain statement rule on direct review does not operate to inject ambiguity into a state court decision that is silent on federal constitutional issues. Because the Court does not apply *Long* in such a

fashion on the "primary avenue" of direct review, it defies logic to suggest that *Long* be so applied in the "secondary and limited" context of federal habeas review. *See Barefoot v. Estelle*, 463 U.S. at 887. Moreover, the fact that this type of procedural default does not constitute an absolute bar to federal habeas review cannot justify a converse presumption that the state court, although not properly presented with federal issues or without jurisdiction to review those issues, nonetheless considered them. Such an assumption is not authorized in the context of exhaustion, *Castille v. Peoples*, 489 U.S. 346, 351 (1989), and it should not be made here. Indeed, it is precisely because the bar to federal habeas review is not absolute that such a false presumption is not warranted. The exceptions of cause-and-prejudice and miscarriage of justice adequately further, in appropriate cases, the federal interest of vindicating constitutional rights.

In the case at bar, Coleman forfeited collateral review in the Virginia Supreme Court because of a default during that proceeding. The pertinent order of the Virginia Supreme Court granted the Commonwealth's motion to dismiss Coleman's appeal, a motion that was based exclusively on Coleman's failure to file a notice of appeal within the time period prescribed by state law. Although the order recited that all the pleadings filed by the parties had been considered, the court did not mention federal law or discuss the merits of Coleman's claims. Here, not only does the order fairly appear to rest on the state procedural bar, but the course of state proceedings does not yield any other reasonable interpretation. In contrast to *Harris*, the federal courts below found that no ambiguity inhered in the state order with respect to the basis of decision.

As discussed more fully in Respondent's Brief, the distinction between *dismissal* of an appeal and the *denial* of review is meaningful under Virginia law. By explicitly granting the Commonwealth's motion and dismissing Coleman's appeal, the Virginia Supreme Court made a



statement of significance: it plainly communicated that disposition of the appeal rested on the procedural grounds identified in the motion. The state court's only failure, if it can be considered such, was not to couch its disposition in the terminology used by the federal courts. This Court should not "'force resort to an arid ritual of meaningless form,'" by insisting that state courts attach a particular label to their otherwise clear procedural dispositions. *See James v. Kentucky*, 466 U.S. at 349 (state bar to review stemming from defendant's request for an "admonition" rather than an "instruction" was not adequate to preclude direct federal review, because the procedural requirement did not further rationally a legitimate state interest), *quoting Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Coleman asks the Court to do no less.

Indeed, the state procedural basis for the supreme court's order is so clear that Coleman repeatedly has conceded the issue. He went so far as to ask this Court, in a petition for writ of certiorari directed to the Virginia Supreme Court, to order the state court to consider the merits of his claims. Even in his brief on the merits in this proceeding, Coleman acknowledges that his state appeal was dismissed because a notice of appeal was not timely filed; he merely assails the independence of that procedural disposition.[8] Brief for Petitioner at 11. Coleman, thus, does not dispute the Virginia Supreme Court's *actual reliance* on his procedural default as the basis for dismiss-

[8]Citing *O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 152 S.E.2d 278, 284 (1967), Coleman contends that the state procedural bar is not "independent" because the Virginia Supeme Court's decision whether to permit a late appeal is governed by the merits of the federal issues presented. As the cases cited in *O'Brien* make clear, out-of-time appeals are granted only where the right that has been abridged is a constitutional right of appeal or a constitutional right to effective assistance of counsel on appeal. *Id.*; *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277, 278 (1970). These constitutional rights are not implicated on state collateral review. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

ing his appeal, and it is the issue of actual reliance that the plain statement rule was intended to clarify. That rule was not designed to relieve federal courts of the obligation of assessing the independence and adequacy of the state ground of decision. Accordingly, state courts are not required, each time a procedural bar is imposed, to iterate the legitimate interests furthered by the rule, trace the rule's history to show that the bar is consistently imposed, or set forth the historical underpinnings of the rule to demonstrate that it was not prompted by federal law. Application of the "plain statement" rule to the order at issue here would not assist the federal courts in dealing with a state decision that is ambiguous as to the ground of decision but, rather, would create ambiguity where none would otherwise exist.

As discussed *supra*, the "plain statement" rule does not obviate federal inquiry into questions of state law, but merely reduces the instances when such inquiry is necessary. Even in cases where a state court opinion, as opposed to a mere order, exists, this Court has examined state law and the course of state court proceedings to determine whether the state court decision is based primarily on federal law. For example, in *Caldwell v. Mississippi*, 472 U.S. 320, 326-27 (1985), the Court examined the state procedural posture of a federal constitutional claim that arguably had been defaulted because it had not been presented to the state appellate court as a specific ground of error. The Court noted that, although the petitioner had not raised the claim as a ground of error in state court, the issue was raised *sua sponte* by the Mississippi Supreme Court, discussed by the parties at oral argument and in post-argument briefs, and addressed in the state court's opinion. Likewise, in *Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984), the Court referred to Ohio's "syllabus rule," providing that the appellate court's holding is contained in the syllabus rather than the opinion, in ascertaining whether there existed an adequate and independent state ground of decision.



The Court also went beyond the face of the opinion under review in *New York v. Class*, 475 U.S. 106 (1986). Specifically, the Court relied upon the New York appellate court's policy of pretermitting consideration of constitutional claims in cases where statutory construction would resolve the controversy and held that the state court's disposition of the constitutional claim indicated the absence of a state statutory ground of decision. *Id.* at 109-10. Additionally, this Court has determined that the opinion of a state court rested on federal law where the state precedent upon which the court below relied interpreted federal constitutional requirements. *Michigan v. Chesternut*, 486 U.S. 567, 571 & n.3 (1988); *see also Oliver v. United States*, 466 U.S. 170, 175 n.5 (1984) (finding that Maine precedent cited in state court's opinion construed federal constitution and then applying plain statement rule).

Where the judgment of the last and highest state court to which federal issues are presented is not accompanied by an opinion, there exists an even greater need for federal courts to consider state law and prior state court proceedings to ascertain whether the condition precedent for application of the "plain statement" rule exists. In the instant case, to require the lower federal courts to ignore the fact that the Commonwealth's motion to dismiss was procedural in nature, where the state court explicitly referenced and granted that motion, is senseless. Coleman's assertion that they should do so, if accepted, would annihilate the substantial concerns of federalism, comity, and finality.

Under Coleman's proposed application of the plain statement rule, even a state appellate court's express adoption of a lower court's findings of procedural default would not be respected on federal habeas review, because the federal courts would have to look beyond the last order entered in the case. *Contra, McCoy v. Lynaugh*, 874 F.2d at 958 (Texas Court of Criminal Appeals' denial of habeas relief on the basis of the findings and conclusions of the

trial court constitutes a plain statement of its reliance on the procedural bars imposed by the lower court); *King v. Lynaugh*, 868 F.2d 1400, 1402 & n.2 (5th Cir.) (same), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1576 (1989). Likewise, it would require state courts to make significant statements about state law in federal terms. For example, the statement of the Circuit County of Buchanan County, Virginia, that certain claims "should be alternatively dismissed on the ground that they are procedurally barred under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom. Parrigan v. Paderick*, 419 U.S. 1108 (1975)," would bar federal habeas review. Although the federal courts would be required to examine state law to ascertain precisely which procedural rule precluded review, inclusion of the magic words "procedurally barred" would earn federal respect. However, if the court had merely stated that the claims "should be alternatively dismissed under the rule of *Slayton v. Parrigan*" its reliance on the state law ground would not command equal federal respect, because reference to *Slayton* would be necessary to reveal the procedural nature of the disposition. A more meaningless distinction can scarcely be imagined.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Respectfully submitted,
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I, Dana E. Parker, Assistant Attorney General of Texas, do hereby certify that three copies of this Brief were served by placing same in the United States Mail, postage prepaid, on this the _____ day of January, 1991, addressed to:

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